

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

VS.

CR. NO. 15-4268 JB  
15-4269 JB  
15-4275 JB  
16-1613 JB

ANGEL DELEON, et al.,

Defendants.

Transcript of Motion Proceedings before  
The Honorable James O. Browning, United States  
District Judge, Albuquerque, Bernalillo County,  
New Mexico, commencing on May 9, 2017.

For the Government: Ms. Maria Armijo; Mr. Randy  
Castellano; Mr. Matthew Beck

For the Defendants: Mr. Brock Benjamin; Mr. Richard  
Sindel; Ms. Cori Harbour-Valdez; Mr. Patrick Burke;  
Mr. Jim Castle; Mr. Robert Cooper; Mr. Roberto  
Albertorio; Mr. Orlando Mondragon; Mr. Noel Orquiz;  
Mr. Nathan Chambers; Mr. Ben Wilson; Mr. Santiago  
Hernandez; Mr. Steven Potolsky; Mr. Richard Jewkes;  
Ms. Amy Jacks; Mr. Josh Spencer; Mr. B. J. Crow; Mr.  
Marc Lowry; Ms. Theresa Duncan; Ms. Amy Sirignano;  
Mr. Christopher Adams; Mr. Michael Davis; Mr. Ryan  
Villa; Ms. Justine Fox-Young; Mr. Donovan Roberts;  
Ms. Erlinda Johnson; Ms. Angela Arellanes; Mr. Samuel  
Winder; Mr. Wayne Baker; Ms. Callie Dixon; Mr. Don  
Kochersberger; Ms. Susan Burgess-Farrell; Mr. Diego  
Esquibel; Mr. Marc Grano; Mr. Ahmad Assed; Mr.  
Gregory Acton; Ms. Marcia Morrissey

For the Defendants (Via telephone): Ms. Carey  
Bhalla

1 THE COURT: Good morning everyone. I  
2 appreciate everyone making themselves available to me  
3 this morning.

4 All right. For the DeLeon defendants,  
5 welcome. This is the first time you've been in this  
6 courtroom. So we will probably try the cases in  
7 here. So it's good to be at numbers that we can  
8 begin to fit in here. And as y'all know, you're not  
9 in black boxes today. So I hope that's appreciated.  
10 And I think it's partly -- you can thank the marshals  
11 for that. They feel like you've been pretty good.  
12 And I appreciate that, and they do, too. And I hope  
13 that will make it more comfortable for you over the  
14 next three days. So let's keep working together,  
15 okay?

16 All right. Let me call the case today, and  
17 I'm going to call all four cases together, and that  
18 way, the counsel only need to enter their appearances  
19 once. So I'll start with United States of America  
20 versus Angel DeLeon, Criminal Matter No. 15-4268 JB;  
21 United States of America versus Mauricio Varela,  
22 Criminal Matter No. 15-4269 JB; United States of  
23 America versus Christopher Garcia, Criminal Matter  
24 No. 15-4275 JB; and United States of America versus  
25 Anthony Ray Baca, Criminal Matter No. 16-1613 JB.

1           So let's start with the Government. Do you  
2           wish to enter appearances?

3           MS. ARMIJO: Good morning, Your Honor.  
4           Maria Armijo, Randy Castellano, and Matthew Beck on  
5           behalf of the United States.

6           THE COURT: Ms. Armijo, Mr. Castellano, Mr.  
7           Beck, good morning to you.

8           And let's start -- get my list here. All  
9           right. Let's start with Defendant Joe Lawrence  
10          Gallegos.

11          MR. BENJAMIN: Good morning, Your Honor.  
12          Brock Benjamin and Mr. Richard Sindel on behalf of  
13          Mr. Gallegos.

14          THE COURT: Mr. Benjamin, Mr. Sindel, Mr.  
15          Gallegos, good morning to you.

16          THE DEFENDANT: Good morning.

17          THE COURT: And for Defendant Edward Troup?

18          MS. HARBOUR-VALDEZ: Good morning, Your  
19          Honor. Cori Harbour-Valdez and Patrick Burke on  
20          behalf of Edward Troup.

21          THE COURT: All right. Ms. Harbour-Valdez,  
22          Mr. Burke, and Mr. Troup, good morning to you.

23          THE DEFENDANT: Good morning, sir.

24          THE COURT: And for Defendant Billy Garcia?

25          MR. COOPER: Good morning, Your Honor. Bob

1 Cooper and Jim Castle on behalf of Billy Garcia.

2 THE COURT: Mr. Cooper, Mr. Castle,  
3 Mr. Garcia, good morning to you.

4 THE DEFENDANT: Good morning.

5 THE COURT: And standing in for -- well,  
6 present for Defendant Allen Patterson?

7 MR. ALBERTORIO: Good morning, Your Honor.  
8 Roberto Albertorio, standing in for Mr. Lahann  
9 representing Mr. Patterson, who is present.

10 THE COURT: Mr. Albertorio, good morning to  
11 you. Mr. Patterson, good morning to you.  
12 Mr. Patterson, you understand that Mr. Albertorio is  
13 standing in for Mr. Lahann?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Is that okay with you?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: Thank you, Mr. Patterson.

18 All right. And for Defendant Christopher  
19 Chavez?

20 MR. MONDRAGON: Good morning, Your Honor.  
21 Orlando Mondragon on behalf of Christopher Chavez.

22 THE COURT: Mr. Mondragon, Mr. Chavez, good  
23 morning to you.

24 And for Defendant Javier Alonso?

25 MR. ORQUIZ: Good morning, Your Honor.

1 Noel Orquiz and Nathan Chambers. We're here on  
2 behalf of Javier Alonso.

3 THE COURT: All right. Mr. Orquiz, Mr.  
4 Chambers, and Mr. Alonso, good morning to you.

5 All right. And for Defendant Arturo  
6 Arnulfo Garcia?

7 MR. WILSON: Good morning, Your Honor. Ben  
8 Wilson, standing in for Billy Blackburn, on behalf of  
9 Mr. Garcia.

10 THE COURT: All right. Mr. Wilson, good  
11 morning to you. And Mr. Garcia, good morning to you.

12 THE DEFENDANT: Good morning.

13 THE COURT: And Mr. Garcia, you understand  
14 that Mr. Wilson is standing in for Billy Blackburn  
15 and Scott Davidson?

16 THE DEFENDANT: Yes.

17 THE COURT: And that's all right with you?

18 THE DEFENDANT: That's fine.

19 THE COURT: All right. Thank you,  
20 Mr. Garcia, Mr. Wilson.

21 All right. And Defendant Mario Rodriguez?

22 MR. HERNANDEZ: Good morning, Your Honor.  
23 Santiago Hernandez and Steve Potolsky on behalf of  
24 Mr. Rodriguez.

25 THE COURT: All right. Mr. Hernandez,

1 Mr. Potolsky, good morning to you. And Mr.  
2 Rodriguez, good morning to you.

3 THE DEFENDANT: Good morning, Your Honor.

4 THE COURT: All right. And for Defendant  
5 Mauricio Varela?

6 MR. SPENCER: Good morning, Your Honor.  
7 Josh Spencer, standing in for Joe Spencer and Mary  
8 Stillinger, on behalf of Mauricio Varela.

9 THE COURT: All right. Mr. Spencer, good  
10 morning to you. Mr. Varela, good morning to you.

11 THE DEFENDANT: Good morning.

12 THE COURT: And Mr. Varela, you understand  
13 that Josh Spencer is standing in for Joe Spencer and  
14 Margaret Strickland (sic).

15 THE DEFENDANT: Yes.

16 THE COURT: That's all right with you, Mr.  
17 Varela?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: And for Defendant Daniel  
20 Sanchez?

21 MR. JEWKES: Good morning, Your Honor. Amy  
22 Jacks and Richard Jewkes representing Daniel Sanchez,  
23 present before the Court and ready to proceed.

24 THE COURT: All right. Mr. Jewkes, good  
25 morning to you. Ms. Jacks, good morning to you. Mr.

1 Sanchez, good morning to you.

2 All right. And for Defendant Conrad  
3 Villegas?

4 MR. CROW: Good morning, Your Honor. B.J.  
5 Crow for Mr. Villegas, who is present.

6 THE COURT: All right. Mr. Crow, Mr.  
7 Villegas, good morning to you.

8 MR. CROW: Good morning, Your Honor.

9 THE COURT: And for Defendant Anthony Ray  
10 Baca?

11 MR. LOWRY: Good morning, Your Honor. Marc  
12 Lowry and Theresa Duncan on behalf of Anthony Ray  
13 Baca, who is present in the courtroom, Your Honor.

14 THE COURT: All right. Mr. Lowry, Ms.  
15 Duncan, and Mr. Baca, good morning to you.

16 THE DEFENDANT: Good morning, Your Honor.

17 THE COURT: And for Defendant Christopher  
18 Garcia?

19 MS. SIRIGNANO: Good morning, Your Honor.  
20 Amy Sirignano and Christopher Adams on behalf of  
21 Christopher Garcia.

22 THE COURT: All right. Ms. Sirignano,  
23 Mr. Adams, Mr. Garcia, good morning to you.

24 And let's see, for Defendant Carlos  
25 Herrera. I may have a telephone -- there we are.

1 MR. DAVIS: Good morning, Judge. Michael  
2 Davis and Carey Bhalla on behalf of Mr. Herrera. Ms.  
3 Bhalla is appearing telephonically.

4 THE COURT: All right. Mr. Davis. Ms.  
5 Bhalla, are you there?

6 MS. BHALLA: Sorry, Your Honor. Yes, I'm  
7 here.

8 THE COURT: All right. That mute button  
9 gets us from time to time.

10 MS. BHALLA: Exactly.

11 THE COURT: All right. Good morning to  
12 you. Mr. Herrera, good morning to you.

13 All right. And for Defendant Rudy Perez?

14 MR. VILLA: Good morning, Your Honor. Ryan  
15 Villa and Justine Fox-Young on behalf of Mr. Perez,  
16 who is present.

17 THE COURT: All right. Mr. Villa, Ms.  
18 Fox-Young, Mr. Perez, good morning to you.

19 THE DEFENDANT: Good morning.

20 THE COURT: And for the Defendant Andrew  
21 Gallegos?

22 MR. ROBERTS: Good morning, Your Honor.  
23 Donovan Roberts on behalf of Andrew Gallegos, who is  
24 present.

25 THE COURT: All right. Mr. Roberts, Mr.



1 Gallegos, good morning to you.

2 THE DEFENDANT: Good morning.

3 THE COURT: For Defendant Santos Gonzalez?

4 MS. JOHNSON: Good morning, Your Honor.

5 Erlinda Johnson on behalf of Santos Gonzalez, who is  
6 present before the Court.

7 THE COURT: All right. Ms. Johnson, Mr.  
8 Gonzalez, good morning to you.

9 And for Defendant Shauna Gutierrez?

10 MS. ARELLANES: Angela Arellanes, appearing  
11 for Shauna Gutierrez, who appears in person.

12 THE COURT: All right. Ms. Arellanes, Ms.  
13 Gutierrez, good morning to you.

14 And for Defendant Brandy Rodriguez?

15 MR. WINDER: Good morning, Your Honor.

16 Samuel Winder on behalf of Brandy Rodriguez, standing  
17 in on behalf of Alfred Creecy.

18 THE COURT: All right. Mr. Winder, good  
19 morning to you. And Ms. Rodriguez, good morning to  
20 you. And Ms. Rodriguez you, understand Mr. Winder is  
21 standing in for Alfred Creecy?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: And that's all right with you?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: Thank you, Ms. Rodriguez.

1           Let me see. All right. And for Defendant  
2 David Calbert?

3           MR. BAKER: Good morning, Your Honor.  
4 Wayne Baker on behalf of David Calbert, who is  
5 present.

6           THE COURT: All right. Mr. Baker, good  
7 morning to you. Mr. Calbert, good morning to you.

8           All right. And for Defendant Sergio Loya  
9 Rodriguez?

10           MS. DIXON: Good morning, Your Honor.  
11 Callie Dixon for Mr. Rodriguez, standing in on behalf  
12 of Donald Kochersberger.

13           THE COURT: All right. Ms. Dixon, good  
14 morning to you. Mr. Rodriguez, good morning to you.  
15 Do you understand that Ms. Dixon is standing in for  
16 Mr. Kochersberger?

17           THE DEFENDANT: Yes.

18           THE COURT: And that's all right with you  
19 today?

20           THE DEFENDANT: Yes.

21           THE COURT: Thank you, Mr. Rodriguez.  
22 And for Defendant Manuel Benito?

23           MS. BURGESS: Your Honor, Susan  
24 Burgess-Farrell, here on behalf of Barry Porter on  
25 behalf of Mr. Benito.

1 THE COURT: All right. Ms. Burgess, good  
2 morning to you. And Mr. Benito, you understand that  
3 Ms. Burgess is standing in for Mr. Porter?

4 THE DEFENDANT: Yes.

5 THE COURT: And that's all right with you?

6 THE DEFENDANT: Yes.

7 THE COURT: Okay. Thank you, Mr. Benito.  
8 And for Defendant Vincent Garduno?

9 MR. ESQUIBEL: Good morning, Your Honor.  
10 Diego Esquibel on behalf of Vincent Garduno, my  
11 client, who is to my right.

12 THE COURT: All right. Mr. Esquibel, good  
13 morning to you. Mr. Garduno, good morning to you.

14 And for Defendant Mandel Lon Parker?

15 MR. GRANO: Good morning, Your Honor. Marc  
16 Grano on behalf of Mandel Lon Parker.

17 THE COURT: All right. Mr. Grano, good  
18 morning to you. Mr. Parker, good morning to you.

19 THE DEFENDANT: Good morning.

20 THE COURT: And for Defendant Daniel  
21 Archuleta?

22 MR. ASSED: Good morning, Your Honor.  
23 Ahmad Assed. I represent Daniel Archuleta.

24 THE COURT: All right. Mr. Assed, Mr.  
25 Archuleta, good morning to you.

1 And for Defendant Anthony Cordova?

2 MR. ACTON: Good morning, Your Honor.

3 Gregory Acton and Marcia Morrissey on behalf of  
4 Anthony Cordova, who is present.

5 THE COURT: All right. Mr. Cordova, Mr.  
6 Acton, Ms. Morrissey, good morning for you.

7 Did I miss anybody? Anybody here that I  
8 didn't call to recognize? All right.

9 Let me talk to you a little bit. I'm going  
10 to -- I have about a 51-page opinion started. It's  
11 going to be a little longer -- it's not going to be  
12 one of my longest -- but it's in progress. I didn't  
13 get it out.

14 As y'all know, we were getting ready for  
15 Mr. Garcia, Christopher Garcia's trial. And so I've  
16 been hearing motions in that and getting opinions out  
17 in that. I hope those are of some guidance to us in  
18 this case as well. But I wasn't able to turn quick  
19 enough to get the opinion out on the motion to sever  
20 that we heard in February. But I'm going to give you  
21 kind of the guts of that opinion. I'm not going to  
22 give all the background. Y'all were here for it, and  
23 that sort of thing.

24 But let me -- because I think it will set  
25 the stage for much of what we're going to be doing

1 over the next three days -- I'm going to grant in  
2 part and deny in part the motion to sever.

3 At the February 7, 2017 hearing, the United  
4 States agreed -- and I want to be careful, because I  
5 don't want to misstate the United States' position --  
6 but they agreed that a joint trial with 20 or more  
7 defendants would be practically untenable. Mr.  
8 Castellano was the one that I was questioning at the  
9 time. And although it's not a concession, the nature  
10 of the United States' agreement was as follows:

11 The Court asked: "Mr. Castellano, let me  
12 ask you a few questions. Would you agree that it's  
13 going to be extremely difficult and probably not a  
14 good idea to try a case with 20 defendants?

15 "MR. CASTELLANO: It may be difficult,  
16 Your Honor. It's not unprecedented. Even one of the  
17 cases cited by the defense, I think, had 23  
18 defendants who were not severed. But I do agree that  
19 there could be some logistical problems.

20 "THE COURT: If we were in agreement on  
21 that, that we probably shouldn't be barreling toward  
22 a trial with 20 defendants, what's the solution from  
23 your standpoint?"

24 Mr. Castellano, said: "Well, the solution  
25 is really how to cut up the pie."

1           The Court then requested, if everybody will  
2   recall, the United States and the defendants present  
3   the Court with different options -- I think that was  
4   over the lunch hour -- regarding its determination  
5   whether -- their determination -- whether the  
6   severance of the superseding indictment in some  
7   manner would be proper. The Court, if you'll recall,  
8   thought it might be a little early at that time to  
9   grant motions to sever. There was some movement  
10   within the case that I was trying to get some feel  
11   for. And so I initially adopted a "wait and see  
12   approach" regarding severance. But today, we're  
13   faced with a July 10, 2017 trial date. Come  
14   tomorrow, we're going to be about two months out from  
15   it, and 19 defendant who are still in the case. So  
16   I'm talking about the DeLeon case. The Court also  
17   notes that various other defendants have, to date,  
18   moved against the superseding indictment alleging  
19   misjoinder under Rule 8 of the Federal Rules of  
20   Criminal Procedure, and the prejudicial joinder under  
21   Rule 14 of the Federal Rules of Criminal Procedure.  
22   And some defendants have also asserted their Speedy  
23   Trial Act rights.

24           The superseding indictment charges a total  
25   of 30 defendants with 15 counts of various assault,

1 conspiracy to murder, murder, and firearms  
2 violations, which the United States further alleges  
3 are violent crimes in aid of the SNM racketeering  
4 conspiracy. The defendants named in the superseding  
5 indictment are not all charged with the same counts  
6 or substantive offenses, causing some defendants to  
7 face a variable level of criminal exposure in  
8 comparison to his or her co-defendants. The  
9 superseding indictment allegations also span a large  
10 period of time, with the first alleged murders  
11 occurring in 2001. After considering the superseding  
12 indictment, the motion to sever, as well as some of  
13 the other defendants' motions related to severance of  
14 the superseding indictment, the Court concludes that  
15 a joint trial of all 19 defendants would be  
16 inappropriate at this time. The unique complexity of  
17 this multi-count superseding indictment, as it now  
18 stands, would in the words of Rule 8 render it  
19 difficult, if not impossible, for the Court to  
20 adequately charge a jury as to the applicable law  
21 with respect to each defendant and for the jury to  
22 apply the law intelligently in reaching verdicts on  
23 the many charges involved. Further, although Rule 8  
24 of the Federal Rules of Criminal Procedure exists to,  
25 quote, "enhance the efficiency of the judicial

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1 system," and although "joint trials conserve state  
2 funds, diminish inconvenience to witnesses and public  
3 authorities," the Court is convinced that a joint  
4 trial for the superseding indictment's charges would  
5 in fact not facilitate any of those principles.

6 Accordingly, acting under its authority under Rule 14  
7 of the Federal Rules of Criminal Procedure, the Court  
8 will sever the superseding indictment at this time in  
9 accordance with the United States' proffer at the  
10 February 7, 2017, hearing: Count 6 through 12 will be  
11 severed from Counts 1 through 5, and 13 through 15 --  
12 16.

13 The Court thus grants in part and denies in  
14 part the motion to sever. So the Court's going to  
15 sever Counts 6 through 12 from Counts 1 through 5,  
16 and 13 through 16. So it's a grant in part and deny  
17 in part of motion to sever.

18 Let's recall what the motion to sever  
19 advanced. It had three main arguments. The first  
20 that Counts 6 and 7 were improperly joined under Rule  
21 8(a), as they do not share a sufficient nexus with  
22 the other charges to permit joinder; two, that 2014  
23 defendants were improperly joined under Rule 8(b), as  
24 they are not alleged to have participated in the same  
25 act or transaction or in the same series of acts or



1 transactions that constitute crimes as the 21 other  
2 defendants; and three, should the Court find joinder  
3 proper under Rule 8(a) and Rule 8(b), severance is  
4 still required under Rule 14 and the Fifth Amendment  
5 because a joint trial of the 2014 defendants for  
6 Counts 6 and 7 alongside the other 21 defendants and  
7 the 13 other counts in the superseding indictment  
8 will deprive the 2014 defendants of their right to a  
9 fair trial. That's on page 2 of the motion.

10 Rule 8 provides the standards for joinder  
11 of offenses and defendants in criminal cases, (a),  
12 "Joinder of Offenses. The indictment or information  
13 may charge a defendant in separate counts with two or  
14 more offenses if the offenses charged -- whether  
15 felonies or misdemeanors or both -- are of the same  
16 or similar character, or are based on the same act or  
17 transaction, or are connected with or constitute  
18 parts of a common scheme or plan."

19 Then (b) deals with "Joinder of Defendants.  
20 The indictment or information may charge two or more  
21 defendants if they are alleged to have participated  
22 in the same act or transaction, or in the same series  
23 of acts or transactions, constituting an offense or  
24 offenses. The defendants may be charged in one or  
25 more counts together or separately. All defendants

1 need not be charged in each count."

2 Courts construe this rule "broadly" -- and  
3 I'm quoting from the Tenth Circuit -- "to allow  
4 liberal joinder to enhance the efficiency of the  
5 judicial system." That's United States v. Bagby from  
6 the Tenth Circuit. This approach recognizes that,  
7 quote, "joint trials 'conserve state funds, diminish  
8 inconvenience to witnesses and public authorities,  
9 and avoid delays in bringing those accused of crime  
10 to trial.'" That's United States v. Jones from the  
11 Tenth Circuit, but it's quoting United States v. Lane  
12 from the Supreme Court in 1986. "Joint trials of  
13 defendants who are indicted together are preferred  
14 because 'they promote efficiency and serve the  
15 interests of justice by avoiding the scandal and  
16 inequity of inconsistent verdicts.'" That's United  
17 States v. Hall from the Tenth Circuit in 2007, but  
18 it's quoting Zafiro from the United States Supreme  
19 Court in 1993.

20 The Court can, first, summarily conclude  
21 that there was not misjoinder of defendants or  
22 offenses in this case. Because the charged offenses  
23 are alleged to be violent in aid of racketeering  
24 activity, the joined offenses are, quote, "connected  
25 with or constitute parts of a common scheme or plan"

1 under Rule 8. Similarly, Rule 8(b) authorizes  
2 joinder of individual defendants in this case,  
3 because the defendants, quote, "are alleged to have  
4 participated in the same act or transactions  
5 constituting an offense or offenses," namely violent  
6 crimes in aid of a racketeering enterprise. That's  
7 from Rule 8(b).

8 And the Second Circuit in *United States v.*  
9 *Weisman* said, if predicate acts could properly be  
10 considered part of a "pattern of racketeering  
11 activity," we see no reason why they could not  
12 similarly constitute part of a "series of acts or  
13 transactions constituting an offense" within the  
14 meaning of Rule 8(b). Indeed, a construction of 8(b)  
15 that required a closer relationship between  
16 transactions than that necessary to establish a  
17 "pattern of racketeering activity" under RICO might  
18 possibly prohibit joinder in circumstances where  
19 Congress clearly envisioned a single trial. The  
20 Court, thus, cannot soundly conclude that the  
21 superseding indictment, making VICAR allegations,  
22 misjoined either the defendants or their charged  
23 offenses. And I draw comfort from that from the  
24 Tenth Circuit case in 2009 of *United States v.*  
25 *Caldwell*, which required a common thread amongst

1 defendants and offenses to warrant joinder.

2 Even if separate counts or defendants are  
3 appropriately joined under Rule 8, where that  
4 joinder, quote, "appears to prejudice a defendant or  
5 the government," a "court may order separate trials  
6 of counts, sever the defendants' trials, or provide  
7 any other relief that justice requires." That is,  
8 Rule 14 provides a safety valve for the highly  
9 technical and inclusive analysis under Rule 8. In  
10 consideration of Rule 14 severance, the Court has in  
11 the past used a three-part test that I outlined in  
12 the Gould case -- Mr. Davis is familiar with that --  
13 to provide -- to guide its analysis. First, it must  
14 determine whether the defenses presented are so  
15 antagonistic that they are mutually exclusive.  
16 Second, because mutually antagonistic defenses are  
17 not prejudicial per se, a defendant must further show  
18 a serious risk that a joint trial would compromise a  
19 specific trial right or prevent the jury from making  
20 a reliable judgment about guilt or innocence. And,  
21 third, if the first two factors are met, the trial  
22 court exercises its discretion and weighs the  
23 prejudice to a particular defendant caused by joinder  
24 against the obviously important considerations of  
25 economy and expedition in judicial administration.

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1 Those are my standards, but I'm discussing United  
2 States v. Pursley from the Tenth Circuit, a 2007  
3 case, when I arrived at those. In consideration of  
4 Rule 14, however, the Court has almost unlimited  
5 discretion to determine whether sufficient prejudice  
6 exists to warrant severance. That's getting that  
7 from the Oppenheimer case from the Supreme Court in 1954.  
8 To that point -- and I'm relying largely on Chief  
9 Judge Weinstein's opinion here, where he analyzes the  
10 Second Circuit. He suggested that a defendant "must  
11 meet the heavy burden of showing that a joint trial  
12 would result in substantial prejudice amounting to a  
13 miscarriage of justice." Here's what he said in  
14 United States v. Gallo: He said, Among the factors  
15 the court must consider in determining whether the  
16 prejudice of a joint trial rises to the level of a  
17 "miscarriage of justice" are the following: The  
18 number of defendants and the number of counts; the  
19 complexity of the indictment; the estimated length of  
20 the trial; disparities in the amount or type of proof  
21 offered against the defendants; disparities in the  
22 degree of involvement by defendants in the overall  
23 scheme; possible conflict between various defense  
24 theories or trial strategies; and especially,  
25 prejudice from evidence admitted only against

1 co-defendants but which is inadmissible or excluded  
2 as to a particular defendant." He noted that "There  
3 are no precise tests applicable to one or a  
4 combination of these factors that can provide a  
5 foolproof resolution under Rule 14." He then said  
6 the Court must determine whether the jury would be  
7 "reasonably able" to consider the evidence as to each  
8 defendant separately, independent of the evidence  
9 against his or her coconspirators. Often relied upon  
10 is the standard formulated by Judge Weinfeld in  
11 United States v. Kahaner, a 1962 case that said the  
12 ultimate question is whether, under all the  
13 circumstances of the particular case, as a practical  
14 matter, it is in the capacity of the jurors to follow  
15 the court's admonitory instructions and accordingly  
16 to collate and appraise the independent evidence  
17 against each defendant solely upon that defendant's  
18 own acts, statements, and conduct. In sum, can the  
19 jury keep separate the evidence that is relevant to  
20 each defendant and render a fair and impartial  
21 verdict as to him?

22 Here, the Court concludes that numerous  
23 logistical and mechanical factors suggest that the  
24 jury's compartmentalization of the evidence during a  
25 joint trial of the 19 defendants might prove to be

1 very difficult or unlikely, and the Court will  
2 accordingly sever the superseding indictment.

3 The Court is convinced that a joint trial  
4 of 19 defendants at this time could prevent the jury  
5 from making a reliable judgment. The Supreme Court  
6 said in *Zafiro*, when many defendants are tried  
7 together in a complex case and they have markedly  
8 different degrees of culpability, the risk of  
9 prejudice that a joint trial would compromise a  
10 specific trial right of one of the defendants or  
11 prevent the jury from making a reliable judgment  
12 about guilt or innocence is heightened.

13 In *United States v. Hack*, the Tenth Circuit  
14 said, "Neither a mere allegation that defendant would  
15 have a better chance of acquittal in a separate  
16 trial, nor a complaint of the 'spillover effect' from  
17 the evidence that was overwhelming or more damaging  
18 against the co-defendant than that against the moving  
19 party is sufficient to warrant severance.'" The risk  
20 that a joint trial of defendants at this time will  
21 prevent the jury from making a reliable judgment is  
22 heightened here, where the superseding indictments  
23 charges reflects the fact that the co-defendants have  
24 "markedly different degrees of culpability," as the  
25 Supreme Court said in *Zafiro*. There is a possibility

1     that in a trial of this magnitude, the jury would  
2     lump all the defendants together and potentially  
3     think of them as a unit, rather than as individuals.  
4     Severing the superseding indictment will lessen this  
5     risk to an acceptable level by lessening the burden  
6     on the jury to compartmentalize the evidence. As  
7     Judge Henderson said back in 1960, in a case that's  
8     often quoted in this area, United States v. Moreton:  
9     The complex involvement of the various defendants and  
10    the multiplicity of charges contained in the  
11    defendant would render it difficult, if not  
12    impossible, for the court to adequately charge a jury  
13    as to the applicable law with respect to each  
14    defendant, and for the jury to apply that law  
15    intelligently in reaching verdicts on the many  
16    charges involved.

17           Compounding the potential ability of the  
18    jury to make a relevant judgment for these defendants  
19    is the impact that the superseding indictment's  
20    complexity will have on judicial resources, given the  
21    superseding indictment's inherent logistical and  
22    mechanical issues as they relate to a 19-defendant  
23    megatrial. It is primarily for those mechanical and  
24    logistical problems which the Court will sever the  
25    superseding indictment into what it considers will be



1 two smaller trials of less than 10 defendants each.  
2 At present time, the Court has retained nearly all  
3 the lawyers on the capable CJA panel, the complex  
4 panel here in New Mexico, to work for defendants in  
5 this case. Judge Lamerth on the D.C. Circuit said in  
6 2001, "First, there is hardship on the administrative  
7 structure of the Court, the absence of any 'one  
8 juror, one defendant, one defense attorney, one  
9 prosecutor 'can thwart the progress of the trial.'"  
10 If scheduling hearings for all of these defendants to  
11 hear pretrial motions is an indicator, the logistical  
12 burden of scheduling and facilitating one large trial  
13 will be difficult. The defendants, further, are  
14 scattered at facilities across New Mexico, the fifth  
15 largest state in the country, which burdens the  
16 United States Marshals and other law enforcement  
17 involved in prisoner transport. The Court can  
18 envision a scenario in a joint trial of all the  
19 defendants where there would be routine delays or  
20 postponements just as a result of the logistics.  
21 Such delays and postponements, the Court assumes  
22 would likely have a negative impact on the jury's  
23 task in this case. Further, the Court has agreed to  
24 try this case in Las Cruces, New Mexico inside of a  
25 courtroom which is smaller than the courtroom in

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1     which the Court has held its hearings in Albuquerque.  
2     At the pretrial hearings, the Court has been so  
3     burdened by the amount of defendants that the  
4     defendants have been seated everywhere in the  
5     courtroom -- and this has included the jury box,  
6     counsel tables, gallery, and even the corner off to  
7     the right side of the Court's bench. And the courts  
8     have looked at this and have discussed the capacity  
9     and physical limitations of a courthouse in regard to  
10    a megatrial for multiple defendants.

11           Indeed, the defendants make an argument  
12    which appeals to this problem in a supplemental  
13    pleading, which suggests that, "although traditional  
14    Rule 8 and Rule 14 considerations are certainly  
15    always applicable, cases have been severed in which  
16    there is no mention of prejudice to the prosecution  
17    or the defendants." The support for such severance,  
18    according to the supplemental pleading, comes from  
19    the Court's inherent authority to manage its caseload  
20    and to sever in the interests of efficient  
21    administration of justice and judicial economy. Some  
22    courts have held -- I'm not basing my opinion on  
23    this -- but "Courts have held the inherent authority  
24    to manage their docket by severing large groups of  
25    defendants into more manageable groups" is basis

1 enough for the Court to do what it's doing today.

2 Generally, holding a joint trial would  
3 certainly be more convenient for the Court. It's the  
4 genesis of Rule 8. The potential prejudice, however,  
5 outweighs this consideration on the facts of this  
6 case as it is presently situated. The Court,  
7 accordingly, concludes that the interests underlying  
8 its Rule 14 authority counsel severance of the  
9 superseding indictment in some fashion given the  
10 logistical and mechanical impossibilities of a  
11 19-defendant megatrial. The United States has  
12 suggested two distinct trials, in which the  
13 defendants are tried only once for the counts in  
14 which they are named. The Court has reviewed the  
15 United States' suggestion, and agrees that their  
16 proffered method of severance of the superseding  
17 indictment will reduce the potential for prejudice  
18 leading the court to conclude that severance of some  
19 type under Rule 14 is appropriate. The Court also  
20 notes that in light of the superseding indictment,  
21 Count 16 will fit neatly into its calculations  
22 regarding severance of the superseding indictment.

23 The breakdown will be as follows: The Court  
24 will sever Counts 1 through 5 and 13 through 16 of  
25 the superseding indictment for one trial, and include

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1 in that grouping the second superseding indictment's  
2 additional defendant, Ms. Rodriguez, as well as Count  
3 16. That severed trial would then involve the  
4 prosecution of 11 defendants, none of whom are named  
5 in Counts 6 through 12. At the February 7, 2017,  
6 hearing, the United States indicated that it  
7 anticipated plea deals would lessen the number of  
8 defendants to as few as six defendants in that  
9 grouping. In the Court's own estimation it  
10 anticipates the number of defendants will fall from  
11 11 to 9 by the time of trial. By severing Counts 1  
12 through 5 and 13 through 16 from Counts 6 through 12,  
13 the Counts 6 through 12 grouping would involve the  
14 prosecution of eight defendants, none of whom are  
15 named in Counts 1 through 5 or 13 through 16. At the  
16 February 17, 2017, hearing the United States  
17 indicated that it anticipated plea deals would lessen  
18 the number of defendants to as few as seven  
19 defendants in that grouping. In the Court's own  
20 estimation, it anticipates the number of defendants  
21 will fall from eight to five by the time of trial.

22 The Court is thus left with two trial  
23 groupings of what it anticipates will be less than 10  
24 defendants each. We talked about this -- I asked  
25 Mr. Potolsky to give me a real cite for this. I

1 didn't uncover in my research any hard and fast  
2 bright line rule. But the Court's confident that  
3 severing the 19 defendants into two trials of less  
4 than 10 will yield the most effective and manageable  
5 path. I did a survey which I'll put in the opinion  
6 of cases: A 2016 case, United States v. Bundy,  
7 severing the indictment charging 17 defendants into  
8 three groups of less than 10 defendants, United  
9 States v. Gray, severing the indictment charging 17  
10 defendants in two groups of less than 10 defendants,  
11 United States versus Andrews from the Northern  
12 District of Illinois considering a 19-defendant  
13 indictment, and ordering severance into three groups  
14 of less than 10 defendants, Gallo, which we've talked  
15 about, considered a 16-defendant indictment severing  
16 into five groups with less than 10 defendants.

17           There are some cases that clearly go the  
18 other way. As the United States has pointed out,  
19 Cervone, a Second Circuit case, they found jury  
20 instructions were sufficient to avoid prejudice in a  
21 RICO case charging 18 defendants with numerous  
22 racketeering offenses. The Second Circuit in 1992,  
23 in the DiNome case, found careful instructions by the  
24 trial judge, an outline of the elements of the  
25 offenses charged, numerous requests for feedback and

1 length of deliberations reinforced the Court's  
2 conclusion that the jury comprehended a RICO case  
3 involving nine defendants charged with numerous  
4 racketeering offenses.

5 Therefore, having reviewed and considered  
6 all the relevant pleadings and briefing in connection  
7 with the motion to sever, the Court concludes, the  
8 most logical, efficient, and manageable way to try  
9 this case is to sever the charges in the superseding  
10 indictment in this fashion. By severing Counts 6  
11 through 12 from 1 through 5 and 13 through 16, the  
12 Court is able to significantly lessen the burden of  
13 this complex case on the District of New Mexico, as  
14 well as elevate the ability of the jury to make a  
15 reliable judgment for defendants. And in light of  
16 the case's expanse and complexity.

17 All right. Ms. Wild has worked with some  
18 of the counsel to come up with a batting order for  
19 the hearing today. So I suggest we go to what I  
20 understand to be motion number 1, which is the  
21 defendants' motion to continue. Let me make a few  
22 comments, and then I'll hear what anybody would like  
23 to say on this motion. Given the opposition by some  
24 of the defendants to it, now given the fact that I've  
25 severed the case, now that at least some defendants

1 are going to get a little bit more time just from the  
2 mechanics of that being severed, I guess I am not  
3 inclined to grant this motion.

4 I can see, however, some circumstances  
5 where, now that I have severed the case, perhaps you  
6 can work out something with the defendants who are  
7 insisting on their Speedy Trial Act rights, and  
8 trying to get this thing to trial. Perhaps you'd be  
9 able to work something out with them. If you can't,  
10 though, I'm not inclined to keep this case off the  
11 trial docket, but keep it moving. And if the parties  
12 can satisfy the people that are wanting to move this  
13 thing forward, then you can reapproach me, and  
14 perhaps I'll be receptive to moving the trial off.  
15 But at the present time I'm not inclined to grant it,  
16 as long as we've got some defendants who are, for  
17 their own particular reasons, trying to keep the  
18 trial on its present course.

19 All right. Who is going to speak in  
20 support of the defendants' motion to continue? Do  
21 y'all have a champion for this? All right. Mr.  
22 Villa, are you the champion?

23 MR. VILLA: Your Honor, it's Mr. Benjamin's  
24 motion, but I believe if I could have just 30  
25 seconds.

1 THE COURT: Take all the time you need.

2 MR. DAVIS: Judge, Michael Davis. One of  
3 the issues that we'd like to have some idea -- and  
4 obviously, it's the Government's prerogative of which  
5 of these two trials go first -- it would be helpful  
6 to have some idea in discussions about the  
7 continuances, which they will choose to go forward  
8 first on. So I'm not sure what their posture is on  
9 that. But I thought I'd bring that to the Court's  
10 attention.

11 THE COURT: Mr. Villa is over talking to  
12 Mr. Beck. Mr. Castellano, you've been the one that's  
13 been most involved in the severance motion. Do you  
14 want to state your position on that or have thoughts?

15 MR. CASTELLANO: Yes, Your Honor.

16 THE COURT: Mr. Castellano.

17 MR. CASTELLANO: I'm willing to make a  
18 proposal at this time. I know that the defense is  
19 asking for a break to discuss it further. So they  
20 may want to have a break after I make my  
21 recommendation.

22 My understanding is that in Count 6 through  
23 12, the only person opposing the continuance of the  
24 trial is Rudy Perez.

25 THE COURT: Right.



1 MR. CASTELLANO: My understanding is now  
2 that he's willing to acquiesce and agree to the  
3 continuance out of that group. That means what I'll  
4 call the Gallegos groups, which is Counts 1 through 5  
5 and 13 through 16, have one defendant who is opposed  
6 to continuance and is requesting a Speedy Trial.  
7 That's Santos Gonzalez. So my recommendation would  
8 be the July 10th setting would be the Gallegos group,  
9 Counts 1 through 5 and Counts 13 through 16.

10 THE COURT: Which are the oldest alleged  
11 crimes. Chronologically, it somewhat fits as well.

12 MR. CASTELLANO: That's correct, Your  
13 Honor.

14 THE COURT: All right.

15 MR. CASTELLANO: And there is one person in  
16 that group demanding Speedy Trial. So it would make  
17 sense to try that first. And I think the defense  
18 wants a moment to confer. But that's our  
19 recommendation.

20 THE COURT: All right.

21 MR. ADAMS: Your Honor, I couldn't hear  
22 that. Could he repeat his --

23 THE COURT: Well, what his recommendation  
24 is, because we got -- in each group we've got  
25 somebody that opposes a continuance. But what I

1 understand, and we'll have Mr. Villa and Ms.  
2 Fox-Young here in a moment tell us, that I think now  
3 they are willing -- Mr. Perez is willing to drop his  
4 opposition to the continuance. So that means that  
5 the second group will be continued. And the first  
6 group, which is also the older alleged crimes, would  
7 be the first one up for July 10th.

8 Is that fairly stated, Mr. Castellano?

9 MR. ADAMS: Again, that's older group being  
10 Counts 1 through 5 and 13 through 15?

11 THE COURT: Correct. So 6 through 12,  
12 which is the one that Mr. Villa is involved in; then  
13 he would -- that would come later. He's willing now  
14 to agree with a motion to continue.

15 Mr. Villa, do you want to speak on that?  
16 Is that your position?

17 MR. VILLA: That is, Your Honor. And if  
18 you saw our response, we sort of had a halfhearted  
19 opposition. But part of it was --

20 THE COURT: You're never halfhearted. I've  
21 never seen that.

22 MR. VILLA: Part of it was the need to have  
23 a ruling on severance. And now that we've got it, I  
24 conferred with the Government, and given the work we  
25 still need to do -- and I won't address that at

1 length, because Ms. Fox-Young will when we address  
2 our motion to compel -- we're okay with a  
3 continuance. And so I would leave it to the other  
4 half, 1 through 5 and 13 through 15 to fight out what  
5 they need to do.

6 THE COURT: All right. Thank you, Mr.  
7 Villa.

8 All right. I'm going to hear from  
9 everybody. But let me go ahead and get this much  
10 accomplished. Since we now have no opposition to the  
11 continuance of the 6 through 12 trial, I will put the  
12 burden on -- who should I put the burden on? Let's  
13 see, Mr. Benjamin, are you in the second group?

14 MR. BENJAMIN: I am in the Gallegos group,  
15 Your Honor, and I'm the author of the motion. But I  
16 would -- based upon the Court's indications and  
17 leaning, I'd like to have a couple minutes to  
18 reformulate an argument, and talk to Ms. Johnson.

19 THE COURT: When you say "Gallegos group,"  
20 you're talking about --

21 MR. BENJAMIN: One through 5 and 13 through  
22 16.

23 THE COURT: Let me then put the burden on  
24 you, Mr. Castellano. Why don't the Government  
25 prepare the order on the motion to continue the trial

1 for Counts 6 through 12; run it past all the  
2 defendants, let's get their agreement on the form.  
3 But it looks like we have agreement on that much.  
4 And while I have declared this case complex, I do  
5 think that it ought to be bulked up as much as  
6 possible for Toombs and Hernandez-Mejia, so that it  
7 withstands any sort of review down the road.

8 All right. Take the time you need. I'll  
9 just sit here. So you just relax, just take the time  
10 you need.

11 MR. CROW: Your Honor, in Counts 6 through  
12 12, would the Court be moving the deadlines as well?

13 THE COURT: We're going to probably talk  
14 about that.

15 MR. CROW: Okay. Thank you.

16 THE COURT: All right. Let me see if we  
17 can get kind of back to order here. Let me make a  
18 few announcements. If y'all are still talking, you  
19 can continue to talk. One is that I will now, in  
20 light of severing the trial, I would appreciate if  
21 the Government and the defendants that are involved  
22 in both those trials try, during the course of the  
23 time we have, to give us some realistic estimates of  
24 how long each one of those trials are going to last.  
25 As you know, we put these things a bit on a runway.

1 And so I'll need to start allocating and carve out  
2 time to make sure that we leave enough time for them  
3 to get tried.

4           Somebody left outside of the courtroom some  
5 keys, car keys, and a cellphone. They were to a  
6 Lexus. I was tempted, but -- I had them returned  
7 down to the front door, so they're now down at the  
8 front door. So if you're missing keys to a Lexus or  
9 a cellphone -- a lot of us would claim those. But  
10 anyway, they're down at the front entrance now. So  
11 you have to pick them up at a break.

12           All right. Mr. Benjamin, I'll give you the  
13 floor. If you wanted to yield the floor, I'll let  
14 you do it, but it's your motion on the first count.  
15 So I'll let you be the conductor, the air traffic  
16 controller here.

17           MR. BENJAMIN: Your Honor, I appreciate  
18 that. I think Mr. Villa wants a little bit of time,  
19 and then while we were in the hallway, I think what  
20 would be best is if the Court would indulge us, if  
21 Ms. Johnson --

22           THE COURT: All right. So you want to go  
23 first?

24           MR. VILLA: Just real quick, before you get  
25 too far in the weeds on 1 through 5 and 13 through

1 16, the Government and the defendants on 6 through 12  
2 have agreed to the continuance as the Court has  
3 indicated. We've also agreed that the scheduling  
4 order that's currently in place can be continued.  
5 And we will -- once we get a trial estimate, which  
6 we've actually been talking about, and figure out  
7 what's going to happen with the other trials, and get  
8 a sense from the Court when our case may be  
9 rescheduled, we'd like to then submit a new  
10 scheduling order that the parties can work together  
11 on and submit to the Court.

12 THE COURT: Okay. If you can't just  
13 immediately agree on a new schedule -- and I  
14 understand that -- let's at least get the motion --  
15 or the motion, order in place, so the order in place  
16 continuing your trial.

17 MR. VILLA: Yes, Your Honor.

18 THE COURT: So even if it's going to take a  
19 while to hammer out the other stuff, let's get that  
20 in place, so we have the record good and tight.

21 MR. VILLA: We'll just put language in that  
22 order saying the scheduling order will be  
23 forthcoming.

24 THE COURT: All right. Thank you, Mr.  
25 Villa.

1 All right. Mr. Benjamin, do you want to  
2 let Ms. Johnson talk?

3 MR. BENJAMIN: Yes, Your Honor.

4 THE COURT: All right. Ms. Johnson.

5 MS. JOHNSON: Your Honor, on behalf of Mr.  
6 Santos Gonzalez, we are the only defendants who are  
7 opposed to the July 10th trial continuance. Prior to  
8 the Court taking the bench after the break, we had  
9 conferred with counsel for the Government. They did  
10 not indicate a position. But here's what we would  
11 propose: Because, initially, when the Court was  
12 issuing its tentative ruling, we thought that the  
13 Court had indicated that you would be severing this  
14 case into three groups, Counts 13 through 16, Counts  
15 1 through 5, and Counts 6 through 12.

16 Your Honor, I would like to ask the Court  
17 for some indulgence in renewing our motion to sever.  
18 And we would respectfully ask that the Court sever  
19 Counts 13 through 16 from Counts 1 through 5. And we  
20 would ask that the Court allow Counts 13 through 16  
21 to proceed to trial in July. We're ready for trial.  
22 We're ready to go in July. Some of the attorneys for  
23 Counts 1 through 5 are not ready.

24 And, Your Honor, would the Court indulge  
25 just some brief argument on a renewed motion to sever

1 Counts 13 through 16 from Counts 1 through 5?

2 THE COURT: You may.

3 MS. JOHNSON: Thank you.

4 THE COURT: As you can tell, one of the  
5 reasons I took some time is because I have thought  
6 long and hard about that. If you saw all the charts  
7 and graphs and things that will probably find their  
8 way into the opinion, you'll see that I gave this a  
9 lot of consideration. But you're free, if you want  
10 to go ahead and make your position.

11 MS. JOHNSON: And I appreciate that, Your  
12 Honor. The problem, respectfully, with grouping  
13 Counts 13 through 16 with Count 1 through 5 is that  
14 what you have is you have evidence that's going to  
15 come in in Counts 1 through 5 that would otherwise  
16 not be admissible in Counts 13 through 16.

17 And here's what's more important, Your  
18 Honor: Is that when you look at the dates of the  
19 incidents, for example, Count 1, Mr. Gonzales was 11  
20 years old when Count 1 occurred. Counts 1 through 5  
21 involved homicides in a prison setting, validated SNM  
22 members. Mr. Santos Gonzalez is neither an SNM  
23 member nor an associate. And that's our position.  
24 More importantly, Your Honor, I'm going to put this  
25 up.



1 THE COURT: But you understand -- and this  
2 is something I'll say -- I can't assume anybody's  
3 case, you know. I know what your argument is, but I  
4 can't assume the Government's case. I can't assume  
5 your case. When I'm making these decisions, I just  
6 have to assume they're disputed, right?

7 MS. JOHNSON: True, Your Honor. And I  
8 understand the Court's look at a facial challenge to  
9 the indictment. However, I would look -- I would  
10 point the Court to the jury instruction. Now, this  
11 is the Ninth Circuit, because we don't have one in  
12 the Tenth Circuit, but pretty much these are the  
13 elements that the Government needs to prove, is that,  
14 number one, that at the time the offense was  
15 committed, that an enterprise affecting interstate  
16 commerce existed. And the problem with going to  
17 trial on Counts 1 through 5 with Counts 13 through 16  
18 is that Counts 13 through 16 -- or excuse me, 14  
19 through 16 -- post-date the original wave of  
20 indictments in this case.

21 Now, essentially, the SNM was dismantled in  
22 December of 2015. So you have Counts 14 through 16  
23 occurring in February of 2016. So you have  
24 evidence -- or if you look at the indictment itself  
25 since you're limited to the facial -- to the

1 information in the indictment -- the SNM was  
2 allegedly started sometime in the 1980s. You have  
3 incidents or crimes occurring in 2001, 2007; as  
4 charged in Counts 1 through 5, 2012. These all  
5 predate the effective dismantling of the SNM with the  
6 first wave of indictments in December of 2015.

7 So then we get February of 2016, when, by  
8 the Government's even own admission, the SNM had been  
9 essentially dismantled. So then what you're going to  
10 have is this prejudicial evidence from Counts 1  
11 through 5, when the SNM was allegedly still active  
12 and had not yet been dismantled. And that's going to  
13 spill over and prejudice the defendants in Counts 14  
14 through 16, because these counts occurred after the  
15 SNM had been dismantled. And that is obvious and  
16 evident from the face of the indictment.

17 And, secondly, Your Honor, the Government  
18 needs to prove that the enterprise, at the time that  
19 the incident occurred, was engaging in racketeering  
20 activity.

21 So I would submit to the Court, Your Honor,  
22 that the evidence that would be admitted in Counts 1  
23 through 5 would result in substantial prejudice as to  
24 Mr. Gonzalez, because effectively, there was no SNM,  
25 or it had been dismantled by the Government by

1 December of 2015.

2 So I would respectfully submit, Your Honor,  
3 that actually Counts 14 through 16 should be tried  
4 separately because of this very dangerous issue that  
5 you're going to have. The Government wants Counts 1  
6 through 5 tried with Counts 14 through 16 because 14  
7 through 16 suffer from tremendous fatal deficiencies.  
8 One of those, as I mentioned, again, is that there  
9 was no enterprise.

10 Your Honor, I would also respectfully  
11 submit to the Court, Your Honor, that the evidence  
12 again -- and I would cite to United States v. Burke,  
13 which is an Eastern District of New York opinion,  
14 where Mr. Ruggiero was tried separately, was granted  
15 a separate trial from the other co-defendant, as he  
16 was charged with a limited -- with offenses that were  
17 limited in scope and time.

18 And that's what you have in Counts 14  
19 through 16 is an incident that occurred one day,  
20 about 15 years after the offenses charged in Counts 1  
21 and 2.

22 So another issue, Your Honor, that is  
23 created, and it's actually -- and the Court cited to  
24 the Gallo opinion, which provides a very thorough  
25 analysis and guidance in determining when the Court

1 should grant the severance in these types of cases,  
2 when you have evidence of a pattern of racketeering  
3 activity -- obviously, the Government still has to  
4 prove evidence of the enterprise -- well, when you  
5 sever a defendant, they're somewhat limited on the  
6 evidence of the predicate acts and the pattern of  
7 racketeering activity that would be admitted, for  
8 example, in Counts 13 through 16 versus Counts 1  
9 through 5, your Honor.

10 And more importantly, Mr. Gonzalez will not  
11 waive his right to a Speedy Trial, his Sixth  
12 Amendment right, his fundamental right. And he  
13 insists on going to trial. And it would be unfair  
14 for the defendants in Counts 1 through 5 to force  
15 them to go to trial, because then you're going to  
16 have ineffective assistance of counsel being raised  
17 in those counts by those attorneys, because they  
18 simply are not ready. And I understand because,  
19 obviously, those counts are far more complex. They  
20 involve homicides, they involve validated members of  
21 SNM, allegedly. And they involve homicides that  
22 occurred allegedly in a prison setting; whereas, in  
23 Counts 13, 14, 15, and 16 -- more specifically 14  
24 through 16, you have most of the defendants in those  
25 counts are not validated SNM members. And, in fact,

1 that's in the face of the indictment. And so -- and  
2 you have dates that post-date the -- as I said  
3 numerous times -- the dismantling of the SNM.

4 So, Your Honor, with those arguments I  
5 would respectfully request that the Court sever  
6 counts -- I would submit 14 through 16, but if the  
7 Court would like to do 13 through 16, we could try 13  
8 through 16 in July, and sever us from Counts 1  
9 through 5. For the additional reasons that I set  
10 forth in my motion, and based on the Burke opinion,  
11 and the Gallo opinion. And if you note in Gallo,  
12 Your Honor, some of those defendants were actually  
13 tried by themselves. There were, I believe, three  
14 groups of three --

15 THE COURT: And I thought that split it up  
16 a little too much. That was my concern about the way  
17 Judge Weinstein did in that case, it split it up too  
18 much.

19 MS. JOHNSON: Your Honor, but I would  
20 respectfully submit that the evidence or what is  
21 before the Court here actually necessitates severing  
22 Counts 13 through 16, primarily because you're going  
23 to have introduction of evidence from 2001, 2012,  
24 2007 -- when the SNM had not been dismantled -- which  
25 would not be admissible in Counts 13 through 16.

1           So I would, on behalf of Mr. Gonzalez, Your  
2 Honor, ask that the Court sever those 13 through 16,  
3 and --

4           THE COURT: Well, I guess on those issues I  
5 think the Government is going to have to decide.  
6 They're going to have to make professional  
7 calculations as to whether their evidence is going to  
8 come in, but -- I mean, I think it's premature for me  
9 to decide what evidence is coming in and not.

10           I know a lot of people argued Bruton  
11 problems and things like that, but the Government --  
12 I got Bruton opinions out there; they can see what I  
13 do with Bruton -- they got to make a calculation and  
14 make -- on these sort of decisions they've got to  
15 make a calculation whether they'll get their evidence  
16 in. But I think it's a little early for me to say  
17 this is in and that's out.

18           MS. JOHNSON: That is true, Your Honor.  
19 But I think that just looking at the face of the  
20 indictment itself, when you look at the counts and  
21 the -- some of the factual allegations in Counts 1  
22 through 5, they're highly inflammatory, as compared  
23 to the allegations in Counts 13 through 16, which  
24 would then, as pointed out in Gallo, would create a  
25 danger of undue prejudice to the defendants in Counts

1 13 through 16.

2 Your Honor, we also have Bruton issues,  
3 which I will raise when the time is proper in Counts  
4 13 through 16.

5 But right now, what I'm asking the Court to  
6 reconsider is severing Counts 1 through 5 from Counts  
7 13 through 16, and letting 13 through 16 go to trial  
8 in July. We're ready. It will be a short trial.  
9 The evidence of the enterprise would take maybe a  
10 couple of days, at most, and it would be condensed,  
11 as opposed to the evidence that would come in as to  
12 the enterprise in Counts 1 through 5.

13 Does the Court have any additional  
14 questions?

15 THE COURT: Well, let me hear what other  
16 people have to say, then I may have some. Thank you,  
17 Ms. Johnson.

18 MS. JOHNSON: Thank you, Your Honor.

19 THE COURT: Any other defendants want to  
20 speak -- I guess, before we go to the full-blown  
21 motion to continue, anybody want to speak on this  
22 motion to sever that Ms. Johnson is renewing?

23 MR. BENJAMIN: Yes, Your Honor.

24 THE COURT: I guess it's in the nature of a  
25 motion to reconsider the ruling that I've made this

1 morning.

2 All right. Mr. Benjamin.

3 MR. BENJAMIN: Thank you, Your Honor.

4 And I'll break up the argument and deal  
5 with -- solely with what Ms. Johnson dealt with,  
6 which is the severance.

7 If the Court looks at just the face of the  
8 indictment, Count 13 is an assault on JG.

9 Count 14 is conspiracy to murder JG.

10 Count 15 is assault, essentially, of JG.

11 Count 16 is the only count in there that  
12 doesn't mention JG by his initials. But that deals  
13 with JG.

14 This is a very limited in time and scope  
15 set of allegations that all involve, essentially, the  
16 same individuals. And so I would request that the  
17 Court reconsider its position on severance, because I  
18 think these are two very, very, very distinct  
19 groupings: 1 through 5 and 13 through 16. Mr.  
20 Gallegos would -- and I've spoken with him, Your  
21 Honor -- consent to being tried twice. He is the  
22 only person who will be in that position if the Court  
23 does sever this into two distinct groups. But the  
24 benefit to not only Mr. Gallegos, but to the other  
25 defendants is a mix, because 13 through 16 -- the



1 Court said something right now that -- I tried a  
2 quadruple homicide in the Western District Texas in  
3 October, Your Honor -- different prosecutors,  
4 different district -- the Court, when we started that  
5 trial told the Government to use its professional  
6 judgment, and the Court used the same phrase -- I  
7 kind of got a chill in my back, Your Honor -- the  
8 professional calculation, we're relying on them to  
9 make a decision as to what to admit and what not to  
10 admit.

11 THE COURT: No, that's not what I'm saying  
12 at all. I'm saying that, right now, they -- they're  
13 over here opposing continuances, agreeing to  
14 continuances, opposing severances, agreeing to  
15 certain things. Y'all are making some arguments like  
16 Bruton arguments. Ms. Johnson did say this evidence  
17 is inadmissible. I can't make those fine tooth to  
18 determine -- this is not a motion in limine. So when  
19 they're making their positions over here, and they're  
20 taking their positions, they've got to make a  
21 decision for themselves -- not for the Court, for  
22 themselves -- as to whether they can get evidence in.  
23 So that's all I'm doing. I'm kind of -- it's a  
24 warning to them, not to you. It's a warning to them  
25 that, if they're going to sit here and oppose

1 severances and things like that, they better think  
2 about their evidence. I can't make a determination  
3 at this point whether certain evidence is going to be  
4 admissible or not. So they're not going to determine  
5 the evidence in the case. I am. But they've got to  
6 make professional judgments as they oppose motions to  
7 sever. Is that clearer?

8 MR. BENJAMIN: No, it's very clear, Your  
9 Honor. And that wasn't necessarily -- and I  
10 apologize -- where I was going with that. But on the  
11 face of the indictment -- not to belabor the point,  
12 Your Honor -- it is a very, I believe, clear and  
13 concise way to sever that. And so we think that that  
14 would limit any prejudice to the other defendants.  
15 And Mr. Gallegos then would be the sole individual  
16 who would be tried twice, Your Honor.

17 THE COURT: Okay.

18 MR. BENJAMIN: And Your Honor, I would just  
19 request time to come back up.

20 THE COURT: Sure. We'll let you come back  
21 up on the motion to continue.

22 All right. Mr. Cooper.

23 MR. COOPER: Thank you, Judge.

24 THE COURT: Mr. Cooper.

25 MR. COOPER: Judge, when we came into the

1 courtroom this morning, we were prepared to argue a  
2 motion, the motion to continue. At that point in  
3 time, there were 19 defendants set for trial. It had  
4 not been severed, all 19 of us were together. I'm  
5 standing here to argue in support of Ms. Johnson's  
6 motion for severance. Because if you deny that  
7 motion for severance, what I think effectively  
8 happens is that we place Santos Gonzalez's right to a  
9 speedy trial -- we elevate that above the right for a  
10 fair trial to all of the Counts 1 through 5  
11 defendants. Those are the oldest cases, Your Honor.

12 I represent Billy Garcia. Billy is charged  
13 in Counts 1 and 2. Those counts occurred in 2001.  
14 It's incredibly more difficult to investigate a 2001  
15 murder than it is a 2007, 2012, or the incidents that  
16 occurred just a couple of years ago.

17 So I think, if it's not severed, then what  
18 I think what we are telling all of the other  
19 defendants, the Billy Garcias, the Allen Pattersons,  
20 the Edward Troups, who are charged in Counts 1 and 2,  
21 that their right to a fair trial is less important  
22 than Santos Gonzalez's right to a speedy trial. And  
23 I think that I would suggest that a severance carving  
24 him out with 13 through 16 would be a good  
25 resolution. That would protect my client's right to

1 a fair trial.

2 Judge, we are not anywhere close to being  
3 ready. We filed on April the 6th a motion to compel  
4 discovery on behalf of Troup and Garcia. In that  
5 case, we cited how we had made specific discovery  
6 requests back in May of 2016; again September 8th of  
7 2016, September 30th, we filed a status report  
8 talking about the motion for specific discovery. We  
9 had a hearing in October, and in that hearing, the  
10 Court directed the Government to give us the  
11 discovery that we were asking for. We still don't  
12 have it. And all of those items are delineated in  
13 our motion to compel discovery on behalf of Troup and  
14 Garcia.

15 Some of the things that we're asking them  
16 to give us are STIU files that we believe that are  
17 incomplete. We have requested, Your Honor, through  
18 IPRA that the Department of Corrections give us these  
19 documents, documents that we know exist, documents  
20 that we've seen in other cases, documents that we  
21 know are in the Department of Corrections, and  
22 probably in the Government's possession.

23 Judge, our response from Department of  
24 Corrections tells us they've got -- they're going to  
25 need five months to produce that stuff. Five months.

1 And we're not getting it. So I think we're not going  
2 to be ready on the July 10th setting.

3 So I think the only way to save that time,  
4 Judge, is to sever the Santos Gonzalez matter, give  
5 him his right to a Speedy Trial. Joe Gallegos is  
6 willing to go; he's the only guy that's in the 1  
7 through 5 and the 13 through 16. He's willing to be  
8 tried separately and willing to go in July.

9 So for all of those reasons, and probably a  
10 lot of reasons that I have failed to identify, failed  
11 to give to the Court, Your Honor, I would ask that  
12 you grant that motion, and that we not be forced to  
13 go to trial on Counts 1 through 5 in July, because we  
14 are just not ready.

15 Additionally, we have retained Dr.  
16 Lieberman from the University of Nevada. And we have  
17 not prepared to subpoena him to court today to  
18 testify on behalf of our motion to sever. And we  
19 think that our motion to sever is probably as good as  
20 any motion that you've seen. And we would like the  
21 opportunity also to argue that down the road.

22 But, Judge, I would support Ms. Johnson in  
23 her effort to get 13 through 16 severed. Thank you.

24 THE COURT: All right. Thank you, Mr.  
25 Cooper.

1           If you want to speak on the motion to  
2 sever -- I know Mr. Cooper began to go on his motion  
3 to continue. I'm going to hold that for a little  
4 bit. Are you going to speak on the motion to sever,  
5 this renewed motion that Ms. Johnson or motion to  
6 reconsider?

7           MR. BURKE: Yes, Your Honor.

8           THE COURT: Okay.

9           MR. BURKE: And many of my comments are  
10 echos of what Mr. Cooper just said. I did want to  
11 point out with regard to Professor Lieberman, it's  
12 pretty obvious to me that you read his declaration,  
13 but we would like to present his testimony, and we  
14 have not made a complete record on our motion to  
15 sever, and we're surprised at that. And I want the  
16 Court to know --

17          THE COURT: You're surprised at what?

18          MR. BURKE: It seems as though you've ruled  
19 on severance without giving us an opportunity to  
20 argue our motion and to present testimony, which we  
21 made it clear we intended to do. And I want the  
22 Court to know it's not for lack of diligence. For  
23 one prior hearing, he had plane reservations, and we  
24 had gone through the CJA procedures, and then it  
25 became apparent that there was not going to be time

1 for him to testify, so we called that off.

2 THE COURT: I'll keep an open mind on your  
3 motion to sever when we get to it. It's teed up  
4 later today, but I do need to rule on the one that  
5 was before me, and I have ruled on that. And so I'll  
6 keep an open mind on it.

7 MR. BURKE: Okay. And you'll give us an  
8 opportunity to speak again.

9 THE COURT: Sure.

10 MR. BURKE: Thank you, Your Honor.

11 THE COURT: You bet, Mr. Burke. Thank you.

12 All right. Anybody else want to speak on  
13 the -- Ms. Wild is reminding me, though, that that  
14 motion -- your motion to sever is not teed up. And I  
15 think the reason is because y'all didn't want it teed  
16 up for this set of hearings. So you know that,  
17 right?

18 MR. BURKE: Well, Your Honor, we were  
19 attempting to address all the logistical issues that  
20 we had.

21 THE COURT: I know, but this is one thing  
22 I'm going to probably be talking about is -- a lot of  
23 the briefing from the defendants is all these motions  
24 aren't ruled on. And then, when I have a hearing,  
25 everybody pulls their motions off these hearings.

1 MR. BURKE: Your Honor, if we had been told  
2 that you were focused on severance, we would have had  
3 Professor Lieberman here and ask him to testify, and  
4 ask the Court to take up that issue.

5 THE COURT: Well, I guess I don't think  
6 it's a surprise that I'm ruling on a motion to sever  
7 I heard in February. I told you I was going to sit  
8 on it a little bit to try to get a better feel for  
9 it. But -- well, that's my thoughts.

10 MR. BURKE: Not only that, Your Honor.  
11 It's very helpful to know where the Court is going  
12 with severance.

13 THE COURT: Sure.

14 MR. BURKE: It's not as though that's  
15 unappreciated. We needed some guidance.

16 THE COURT: That's the reason I took some  
17 time to explain my reasoning on it. Thank you, Mr.  
18 Burke.

19 All right. Anybody else want to speak on  
20 Ms. Johnson's -- I'm going to call it a motion to  
21 reconsider, I guess, what I have done? Anybody else  
22 want to speak on the defendants' side?

23 All right. Mr. Castellano, do you want to  
24 take up Ms. Johnson's request? Do you want to go  
25 with a small trial in July and -- you had made -- you



1 had joined this motion to continue. What's your  
2 thoughts?

3 MR. CASTELLANO: We would request to keep  
4 the trial together at this time, Your Honor.

5 Everyone points to the face of the  
6 indictment, indicating that these are discrete acts.  
7 But if you look at the face of the indictment, what  
8 it establishes is one of the elements that we would  
9 have to prove at trial, and that's the ongoing nature  
10 of the enterprise. If you have an association of  
11 fact enterprise, there is a requirement to show the  
12 ongoing nature of the enterprise.

13 So if the SNM started in approximately  
14 1980, and exists until today, that's evidence we  
15 would have to prove. I disagree with Ms. Johnson  
16 that arresting and imprisoning members of the SNM  
17 dismantles the organization. I mean, this case is a  
18 perfect example of that. We have a number of murders  
19 that occurred in prison. So I think a number of  
20 defendants in this case would disagree with the fact  
21 that the SNM is now at an end.

22 So arresting and imprisoning members of the  
23 SNM does not dismantle the enterprise. There is an  
24 SNM in the state system, and there is also a SNM in  
25 the federal system. So this doesn't put an end to

1 anything at this point.

2 THE COURT: And you're prepared to prove  
3 that at trial, that it's a continuing, ongoing  
4 operation through the later counts?

5 MR. CASTELLANO: That's correct, Your  
6 Honor. I mean, we've had people since this time who  
7 have been charged separately who are SNM members. So  
8 the activity has been ongoing, even after the events  
9 of this indictment.

10 So what we're going to have -- as I said to  
11 the Court before, really, how many times do you want  
12 to hear the same evidence or see the same defendants?  
13 And I agree with the Court's ruling. I mean, we all  
14 know --

15 THE COURT: Well, I hope that I've  
16 exhibited my patience is fairly long. I'll hear  
17 stuff over and over, if that's what it takes to do  
18 justice. So I don't think I'm the one that's mainly  
19 at issue here. I think it's really me trying to  
20 serve the parties in this case and trying to make  
21 sure that we do justice there.

22 MR. CASTELLANO: I understand, Your Honor.  
23 And still, in terms of judicial economy, two trials  
24 is better than three. It is the same evidence.  
25 People have mentioned Bruton. And I've also

1 mentioned before the Cook and Smalls cases. So any  
2 statement these individuals made to each other --

3 THE COURT: You've eyeballed the evidence  
4 that Ms. Johnson has talked about on her Bruton  
5 issue? Usually, I can solve Bruton problems with  
6 scissors and tape and a copy machine, and things like  
7 that. I mean, we usually can work around it to make  
8 sure that it's fair to the co-defendants. You've  
9 stared at this evidence that she's concerned about,  
10 and think we can -- not think, but feel like we can  
11 avoid the Bruton problems?

12 MR. CASTELLANO: I believe we can, Your  
13 Honor. And I think we have addressed that in our  
14 brief. Some of the statements are statements --

15 THE COURT: Some of the discussion by both  
16 the defendants and the Government was probably too  
17 general for me to make an independent determination  
18 as to whether it was going to solve the Bruton  
19 problem. It seems it was a little early for me to  
20 probably make that determination.

21 MR. CASTELLANO: I agree, Your Honor. And  
22 I think that any statements made on the date of the  
23 crime between co-defendants, if we have somebody to  
24 come forward and testify at trial, those statements  
25 will all come in under the Cook and Smalls cases out

1 of New Mexico. So those are not Bruton statements.  
2 So if somebody comes in and tells the jury what each  
3 of the members of the conspiracy said on that date,  
4 those are coming in against all members. So those  
5 fall outside of Bruton.

6 Obviously, post-arrest statements are what  
7 the Court will be looking at, eventually, and I think  
8 we can deal with that. So as I said earlier, we do  
9 have 2001 murders.

10 THE COURT: But you understand I probably  
11 am not in a position to make a ruling on that. I'm  
12 just going to have to leave it to you that if you're  
13 going to oppose a severance you think you can get the  
14 evidence in and won't be surprised if do I something  
15 different?

16 MR. CASTELLANO: We understand that we do  
17 so at our own peril, Your Honor. We get that.

18 So the oldest murders are 2001 murders.  
19 But after that, Count 3 is as recent as 2007; Counts  
20 4 and 5 are 2012, and Counts 13 through 16 are in  
21 2015 and 2016. So most of them are more recent, and  
22 most of them -- actually, all of those, as I said  
23 earlier, show the ongoing nature of the enterprise.

24 What the defense wants to do is give the  
25 jury something that's limited in scope, and just say

1     this is really what it's about. But it doesn't  
2     matter what age Santos Gonzalez was when the first  
3     murder happened. It only matters whether or not we  
4     can prove our case against him at the time he's  
5     charged, and we think that we can. So the fact that  
6     this is ongoing in nature is what's reflected on the  
7     face of the indictment. It's not the opposite.

8             THE COURT: Say that again.

9             MR. CASTELLANO: This is ongoing. And the  
10    defense has said: Look at the face of the indictment  
11    and that tells you that it's not. But what I'm  
12    saying is it shows just the opposite of that. That,  
13    from 2001 to 2016, we're establishing, or will  
14    establish criminal activity and racketeering activity  
15    on behalf of the SNM Gang.

16            So at this point, I would ask that the  
17    Court keep them together.

18            THE COURT: All right. So where are you  
19    now on -- let me leave it at that, because I've  
20    separated out the motion to continue. So you're just  
21    arguing on Ms. Johnson's. That's appropriate.  
22    Anything else then, Mr. Castellano?

23            MR. CASTELLANO: That's correct. No, Your  
24    Honor.

25            THE COURT: All right. Thank you, Mr.

1 Castellano.

2 MS. JOHNSON: May I respond?

3 THE COURT: Yes, you can. Let me see if  
4 any of the other defendants want to say anything on  
5 the motion to sever before I give Ms. Johnson the  
6 last word.

7 All right. Ms. Johnson.

8 MS. JOHNSON: Thank you, Your Honor.

9 Your Honor, first I'd like to address the  
10 Bruton issue. I have Exhibits A and B that I'd like  
11 to tender to the Court. These are reports of the  
12 statements provided by co-defendants Brandy Rodriguez  
13 and Shauna Gutierrez. And these are not  
14 co-conspirator statements, these are post-arrest  
15 statements that do raise a Bruton problem.

16 May I tender those to the Court, Your  
17 Honor?

18 THE COURT: You may.

19 It sounds like the Government is willing to  
20 run the risk that you may be right on this Bruton  
21 problem, and I may keep this evidence out, and they  
22 still want to try the cases together, rather than  
23 separately.

24 MS. JOHNSON: Your Honor, I would submit to  
25 the Court that Exhibits A and B show that clearly Ms.

1 Gutierrez made statements, post-arrest statements,  
2 that implicate Mr. Gonzalez. Essentially, her  
3 statements put Mr. Gonzalez at the scene of a crime.  
4 Those are clearly inculpatory statements that raise a  
5 Bruton issue, if we're tried with Ms. Gutierrez.  
6 Ms. Rodriguez also implicated Mr. Gonzalez. Not just  
7 what one co-defendant said during the alleged  
8 commission of the crime, but simply you have these  
9 defendants making post-arrest statements to the  
10 Government about what each co-defendant allegedly  
11 did.

12 And, Your Honor, I would submit to the  
13 Court that simply redacting, cutting out Mr.  
14 Gonzalez' name is going to -- is not going to cure  
15 the problem.

16 THE COURT: It may not. And I'm not making  
17 any ruling on that. So I understand.

18 MS. JOHNSON: And just to --

19 THE COURT: Let's say these got kicked out,  
20 let's say these things got kicked out. Is there  
21 still evidence against your client?

22 MS. JOHNSON: Well, if those statements  
23 were -- it would be very, very thin, I would submit  
24 to the Court.

25 THE COURT: So isn't that a good

1 development for you?

2 MS. JOHNSON: It is.

3 THE COURT: So how much prejudice can you  
4 really show by me denying your motion to sever?

5 MS. JOHNSON: Well, Your Honor, then we're  
6 still going to trial with the co-defendants who made  
7 those statements. And then, if the Court kicks them  
8 out, so now we are -- the Government is going to try  
9 to introduce those statements against each one of  
10 those defendants.

11 But I want to go back, Your Honor, to  
12 Counts 1 and 2, for example. Those homicides or that  
13 homicide occurred in 2001. And when you look at HJ,  
14 Inc. versus Northwestern Bell, which is at 492 U.S.  
15 229, at page 239, one of the requirements that the  
16 Government has to prove is that the racketeering --  
17 now, that's a RICO case -- but that the racketeering  
18 predicates -- because they still have to prove the  
19 enterprise -- that these predicates are related.

20 So the issue -- this goes back to the issue  
21 addressed in Gallo, that introduction of evidence  
22 from 2001 is going to result in undue prejudice to  
23 Mr. Gonzalez, because you have a homicide that  
24 occurred in a prison setting 15 years earlier.

25 There is a question, even on the face of



1 the indictment that that is not related to the  
2 incidents alleged in Counts 13, 14, 15, and 16.

3 So again, Your Honor, I would strenuously  
4 request that the Court grant Mr. Gonzalez' severance.  
5 The Court has done it. Mr. Andrew Gallegos, the  
6 other Andrew Gallegos who appeared before the Court  
7 pretty early on, you severed him. They were ready  
8 for trial.

9 THE COURT: But that didn't work out too  
10 well, did it?

11 MS. JOHNSON: I don't know what happened to  
12 him.

13 THE COURT: Well, I mean, they said they  
14 were ready to go to trial, and all that. And it  
15 didn't happen.

16 MS. JOHNSON: Well --

17 THE COURT: So that was -- you know, that  
18 was -- you know, there was all these assurances that  
19 they were ready to go to trial; that they were just  
20 on the eve of trial when this got indicted. And it  
21 hasn't turned out that well. So I guess, if I'm  
22 going on experience from there, I guess I'm not  
23 pleased with that one.

24 MS. JOHNSON: I understand, Your Honor.  
25 But I would submit to the Court -- I've been before

1 this Court since this Court took the bench; I've been  
2 practicing in federal court exclusively for 17 years.  
3 I would submit to the Court that when I tell you I'm  
4 ready for trial --

5 THE COURT: Oh, I know.

6 MS. JOHNSON: -- I will be ready for trial.

7 THE COURT: I trust you.

8 MS. JOHNSON: So, Your Honor, we would  
9 again renew our motion to sever.

10 THE COURT: Thank you, Ms. Johnson.

11 Well, I've certainly thought about Ms.  
12 Johnson's opposition to the motion to continue, and  
13 the reasons for it. And have thought long and hard  
14 about the motion to sever that I expected her to  
15 renew today. I wanted to get a feel for what people  
16 had to say after I made the order of severance that I  
17 did. I wanted to see if the Government, after I  
18 severed this way, what their position would be. But  
19 I am not seeing the -- once I sever down, and really  
20 focus what I think is one of the main things, is when  
21 I turn to this jury and start instructing this jury,  
22 whether they can compartmentalize the evidence. And  
23 I think on Ms. Johnson's client that they can. They  
24 can compartmentalize. I think it's going to be  
25 reduced. I know there is going to be some

1     evidentiary issues; I don't minimize those in any  
2     way, and we're going to have to work through those.  
3     But I think, as far as giving Ms. Johnson, her  
4     client, a fair trial, I think I have gone a long ways  
5     toward doing that. And so I'm not inclined to grant  
6     the motion to reconsider, the renewed motion to  
7     sever.

8             Down the road, if it pops up and the  
9     Government starts looking at its evidence and wants  
10    to rethink it, we can certainly look at it at that  
11    time. But I think at the present time severance has  
12    been granted is going to solve a lot of the problems  
13    for Ms. Johnson and Mr. Gonzalez. And so I'm not  
14    inclined to grant it.

15            All right. Mr. Benjamin, if you now want  
16    to argue your motion to continue.

17            MR. BENJAMIN: Thank you, Your Honor.

18            Your Honor, Mr. Gallegos filed a motion to  
19    continue the trial setting for July 10th's date. And  
20    I think that at this point in time we definitely  
21    would reurge that, Your Honor. There is multiple  
22    things that put us in the position we are today,  
23    where for Counts 1 through 5 specifically, Mr.  
24    Gallegos, and others who have joined this motion, are  
25    not ready for trial. As I put in the motion, this

1 case is regarding Counts 1 and 5 is in the initial  
2 motions practice stage, Your Honor. We're still  
3 hearing motions to disclose CIs. We have a motion to  
4 dismiss that the Court has set on this set of  
5 hearings. But, depending on what happens on that,  
6 there is going to be a lot of further litigation  
7 regarding that, Your Honor. There are outstanding  
8 motions to suppress and other evidentiary issues.

9 This has been brought on by the  
10 Government's actions in this case, Your Honor. The  
11 Government has been producing rolling discovery.  
12 That rolling discovery is what led to Document 1023,  
13 the motion to dismiss or produce the Grand Jury  
14 transcripts in relations to the charges that form the  
15 basis for Counts 4 and 5. And that's specifically  
16 because in Document 1580, produced approximately  
17 April of 2016, they made the allegation that was then  
18 reiterated in a later 4473 document, that then was  
19 retracted by the Government after the second  
20 superseding indictment. And so their actions are  
21 what has put us in this position.

22 Not only that, but, Your Honor, there is a  
23 second superseding, as the Court's aware, that added  
24 a brand-new defendant to this cause, Brandy  
25 Rodriguez. They've now also filed -- that's set for

1 this hearing -- a motion to determine conflict of  
2 counsel who, to the best of my understanding, Your  
3 Honor, the Government has been aware of what's been  
4 going on.

5 They then -- and I believe we'll talk about  
6 this -- have seized the tablets. So now, we have a  
7 limited amount of time between May, and as the Court  
8 noted, tomorrow is essentially 60 days from the  
9 proposed trial setting.

10 Mr. Gallegos does not have the ability to  
11 review any further discovery effectively, or very  
12 quickly. Because, as the Court will recall, one of  
13 the things that we talked about initially with this  
14 case, and that led to the tablets was Otero, where  
15 Mr. Gallegos is detained, has one meeting room where  
16 you can meet with your client and conduct a contact  
17 visit. That meeting room, Your Honor, is essentially  
18 reserved ahead of time and used. There is five  
19 defendants from this case there. There is other  
20 defendants that I personally have at that facility,  
21 out of the District of New Mexico and the District of  
22 Texas, that we use that contact visit room. And so  
23 there is not even a practical way to review what will  
24 inevitably be the large discovery dump that comes  
25 before the trial.

1           The Court has resolved, I believe, the  
2           majority, and has noticed that the Government's  
3           position initially in opposing this continuance was  
4           not on moving a trial, any trial. It was simply  
5           everybody has to agree or everybody gets punished.  
6           That, essentially, takes me back to the United States  
7           Army when I was in, Your Honor.

8           But that isn't where we're at. We have  
9           Counts 1 through 5, where we were still diligently  
10          working, filing motions that are to be heard. And I  
11          appreciate the Court setting something that was just  
12          filed on Counts 4 and 5, so that we may hear that,  
13          the motion to dismiss.

14          But there are fluid arguments that are  
15          being made by the Government in different filings and  
16          its responses. And so at this time, I can tell this  
17          Court that I do not have a handle on Counts 1 through  
18          5. The evidence and the allegation is still fluid  
19          and not set. And I do not believe it's prepared for  
20          trial, Your Honor.

21                THE COURT: All right. Thank you, Mr.  
22          Benjamin.

23                MR. BENJAMIN: Thank you, Your Honor.

24                THE COURT: Mr. Castle.

25                MR. CASTLE: Thank you, Your Honor.

1           The Court earlier, in speaking to Mr.  
2       Burke, had mentioned that certain motions were set  
3       for hearing and certain ones weren't. I've got to  
4       tell the Court kind of the reasoning behind some of  
5       the staging of the motions.

6           THE COURT: And I'm not critical of that.  
7       I understand that. But, on the other hand, then the  
8       defendants use it against me, saying, Well, you know,  
9       you've got all these motions to rule on. So that's  
10      what I'm sort of saying. I've got to kind of protect  
11      my record here, too. I understand why with this  
12      group y'all have to talk and juggle things around.  
13      But at the same time, there are requests that some  
14      motions not be heard.

15          MR. CASTLE: The reason I bring it up, Your  
16      Honor, though, is for the longest time, the Counts 6  
17      and 7 defendants said they were ready to go to trial.

18      And their motions for informants got set early, got  
19      resolved early. The Count 1 and 2 people, knowing  
20      that, were willing to basically take a backseat so  
21      that they could litigate their motions. And now  
22      today -- in fact, that's what we believed up until  
23      today -- that that was kind of the situation.

24          And now, because of an agreement of 6  
25      through 12 defendants with the prosecution,

1 essentially, the 1 through 5 and the 13 through 16  
2 defendants are being told to go earlier. We're the  
3 sacrificial lambs because of an agreement between the  
4 Government on 6 through 12.

5 We are having -- so, for example, our CI  
6 motions haven't been litigated, even though in our CI  
7 motion the Government has already agreed that they  
8 needed to turn over one of the identities of one of  
9 the informants, they still haven't done that. So our  
10 litigation is behind the 6 and 7 litigation.

11 Now, I understand the 8 through 12  
12 defendants never requested to go early, and -- but  
13 some of their litigation has already been done  
14 concerning informants, et cetera.

15 THE COURT: Say that again.

16 MR. CASTLE: Some of the 8 through 12  
17 defendants have had their litigation done. I think  
18 Mr. Sanchez' confidential informant was argued a  
19 couple months ago.

20 So these are real problems. And I don't  
21 want to pit our defendants against the other  
22 defendants, but it kind of feels that that's what's  
23 happening here. And I apologize for pointing out the  
24 elephant in the room, to some extent. But that's  
25 what -- I can tell the Court that when we took our



1 break, the 1 through 5 and 13 through 16 defendants  
2 felt like an agreement had been made without our  
3 input.

4 THE COURT: But is that bad? I mean, you  
5 know, there is a lot of competing interests, and  
6 people -- you know, I've got all sorts of cases where  
7 defendants -- and sometimes there are plaintiffs in  
8 civil cases, you know, they just can't come to an  
9 agreement, and something happens, which is -- you  
10 know, I came in here and made a ruling, then that  
11 forces other people to sort of reassess where they  
12 are.

13 MR. CASTLE: Well, it's not bad. But I'm  
14 just telling the Court what our position is. The  
15 agreement was made before our position was known.

16 I can tell the Court it's very difficult to  
17 investigate a case that happened 15 years ago. And  
18 the Government is having difficulty giving us  
19 materials from that time period. For example, the  
20 DNA testing that was done, that's still out there.  
21 They said: We're going to make our best effort to  
22 try to get you the underlying data concerning the DNA  
23 testing. But they haven't gotten to it. And  
24 probably because they're trying to track down  
25 materials that were stored in a state facility 15

1 years ago.

2 In my experience, homicides that happened  
3 in the last one or two years before a trial are a lot  
4 easier to investigate than an old case.

5 And so these are the interests that we're  
6 asking the Court to take into consideration. We  
7 have -- we were the first defendants to request  
8 discovery on Counts 1 and 2. It's still yet to be  
9 produced to a large extent. We've been diligent in  
10 seeking those materials, yet we don't have them.

11 And so I would suggest that the Court  
12 consider continuing the trial. I know we're not  
13 going to get severed from the other defendants in  
14 Counts 3 through 5 and 13 through 16. But the need  
15 for a continuance for our set of defendants is great.  
16 Just in addition to the amount of litigation we still  
17 have to do, it's just impossible to get all the  
18 investigation done by July. And I think we'll be  
19 back in here -- if the Court sets it for July, that  
20 we'll be back in here with information that we need  
21 to put on the record, but out of the presence of the  
22 prosecution, which would establish our difficulties  
23 in investigating this case and why we need additional  
24 time.

25 THE COURT: All right. Anything else,

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1 Mr. Castle?

2 MR. CASTLE: No, Your Honor.

3 THE COURT: Thank you, Mr. Castle.

4 Let me do this: I need to let Ms. Bean  
5 rest her fingers. I won't cut anybody off. I'll  
6 hear what you have to say on the motion to continue.  
7 But let's take a break and let Ms. Bean rest her  
8 fingers. We'll be in recess about 15 minutes.

9 (The Court stood in recess.)

10 THE COURT: All right. Everybody be  
11 seated. K'Aun reminds me that I sent everybody into  
12 a tither by saying that this is where we'd be trying  
13 the DeLeon case. I'm wrong, and I apologize for  
14 that. We are trying it in Las Cruces. I think I  
15 corrected myself when I was giving my opinion,  
16 because I was pointing out that I was going to have a  
17 smaller courtroom down there than we've been working  
18 with. We'll probably be doing a lot in here over the  
19 next couple of months.

20 All right. Mr. Burke, I think you were  
21 going to --

22 MR. DAVIS: Judge, before Mr. Burke takes  
23 the podium, may I make a brief comment based on --

24 THE COURT: Well, if Mr. Burke wants to  
25 give you leave? He does. Mr. Davis.

1 MR. DAVIS: Thank you, Judge. Michael  
2 Davis on behalf of Carlos Herrera.

3 THE COURT: Mr. Davis.

4 MR. DAVIS: Judge, I just wanted to comment  
5 on something that Mr. Castle said. I know the jaws  
6 of eight collective teams dropped when he made the  
7 comment that somehow there was some sort of agreement  
8 with the Government that the Counts 6 through 12  
9 people were going to go first in the case. I'm not  
10 sure where Mr. Castle gets that. But there has never  
11 been any -- any communication between the Government  
12 and the Counts 6 and 7 attorneys regarding which case  
13 would go first.

14 I would just note that that has always been  
15 the Government's prerogative, who goes first. That's  
16 their choice on who they prosecute. And any  
17 indication that somehow the Count 6 through 12 counts  
18 are somehow less complicated than the 1 through 5,  
19 and other counts, frankly, I just don't buy that. I  
20 may not be as smart as Mr. Castle. But the case is  
21 just as difficult for all of us.

22 THE COURT: And you noticed I'd tried to  
23 avoid characterizing it. Because I don't have a  
24 feel. And, you know, rarely do I ever say that case  
25 is easy and that one is hard. That's just --

1 MR. DAVIS: I just wanted to clarify that  
2 in any sense that Mr. Castle was speaking for all of  
3 us. I will reiterate what Mr. Cooper said: When we  
4 came here this morning, this was a motion to continue  
5 on all the defendants in the case before the Court  
6 raised the severance issue which threw the monkey  
7 wrench into what we were going to say this morning,  
8 but --

9 THE COURT: Well, you got half the motion  
10 granted.

11 MR. DAVIS: Yes, Judge. Anyway, I just  
12 wanted to clarify that.

13 THE COURT: All right. Thank you, Mr.  
14 Davis.

15 Mr. Burke.

16 MR. BURKE: Thank you, Your Honor. My  
17 comments are made based on the assumption that the  
18 Gallegos group is sort of set. I know you're going  
19 to give us an opportunity to be heard further on  
20 that, and that we're in the lead now, so to speak.  
21 And I have no other comments about that.

22 But as to our group, Your Honor, it seems  
23 to me that all of the defendants in the Gallegos  
24 group, except one, are not only not ready for trial,  
25 we've announced to the Court that we're not ready for

1 trial.

2 The Government's concern, perhaps  
3 legitimate, is they don't want, through circumstance,  
4 trials to keep being broken up so that we end up  
5 having more trials than they hope. And the Court has  
6 expressed itself with regard to how the Court  
7 believes that it should be divided up. But it seems  
8 to me the very clear remedy, so that our clients, Mr.  
9 Troup, and our co-defendants, get a fair trial when  
10 we are ready for trial, is to kick over the Joe  
11 Gallegos group. And the impediment seems to be the  
12 speedy trial rights for Santos Gonzalez. However,  
13 the clock is not running on Santos Gonzalez, so that  
14 should not be an impediment. And to the extent that  
15 there may be a constitutional right for a Speedy  
16 Trial on Mr. Santos Gonzalez' part, that must give  
17 way to the other defendants in the Joe Gonzalez (sic)  
18 group's constitutional right to a fair trial. And I  
19 don't believe that the Government would be objecting  
20 as long as the Joe Gallegos group moves together.

21 So that is my request, Your Honor. Thank  
22 you.

23 THE COURT: Say that again. I don't  
24 believe -- what were you trying to say at the very  
25 end there?

1 MR. BURKE: I'm sorry, Your Honor. What I  
2 was saying at the end is that the remedy, it seems to  
3 me, it's fairly clear that if the Joe Gallegos group  
4 is to move together, stay together -- which seems to  
5 be where this is headed -- that it needs to stay  
6 together later on, and the continuance be granted.  
7 And that the dilemma for the Court is you need to  
8 make -- I'm asking you to make some findings  
9 regarding Santos Gonzalez, that his speedy trial  
10 rights, to the extent that they exist at all, because  
11 the clock is not running on him, must give way --  
12 must give way -- to the rights of the other  
13 defendants to get a fair trial.

14 THE COURT: All right. Thank you, Mr.  
15 Burke.

16 MR. BURKE: Thank you.

17 THE COURT: All right. I know all the  
18 defendants want a continuance, so you don't need to  
19 stand just to tell me that. But does anybody else  
20 want to speak on the motion to continue from the  
21 defendants' side?

22 All right. Mr. Chambers.

23 MR. CHAMBERS: I'd just refer the Court to  
24 18 United States Code 3161(h)(6), as it relates to  
25 Mr. Gonzalez, his being adjoined with other

1 defendants and the impact that has on his speedy  
2 trial rights.

3 THE COURT: All right. Thank you,  
4 Mr. Chambers.

5 MR. CHAMBERS: Also, I don't want my  
6 silence to be construed as acquiesce. I also am not  
7 prepared for trial.

8 THE COURT: All right. I'll assume that.  
9 That's what was in the motion. So if you feel like  
10 you need to say that -- don't feel like you have to  
11 say that, because I'm assuming that.

12 Mr. Cooper.

13 MR. COOPER: Judge, the other thing that --  
14 I think you asked Mr. Burke to come back up to the  
15 podium to talk about the last bit of his discussion.  
16 What he did say is the Government has no objection to  
17 a continuance, provided all of the Gallegos  
18 defendants are continued, including Santos Gonzalez.  
19 So I think he didn't reiterate that portion of it.  
20 So the Government would have no objection to a  
21 continuance from that July setting, is my  
22 understanding, having talked to them during the  
23 break, as long as all of the Joe Gallegos defendants  
24 are continued.

25 Thank you.



1 THE COURT: All right. Thank you, Mr.  
2 Cooper.

3 Ms. Johnson.

4 MS. JOHNSON: Your Honor, I just want to  
5 make sure. This is Erlinda Johnson. I want to make  
6 sure that Mr. Gonzalez' record is very clear. And I  
7 appreciate the other defendants' position, Your  
8 Honor. And there is also a danger, Your Honor, in  
9 compromising Mr. Gonzalez' right, constitutional  
10 right, to a speedy trial.

11 And as Tenth Circuit stated in United  
12 States v. Hall, that if there is a risk of  
13 compromising a constitutional right of a defendant --  
14 again, Your Honor, I know you've already ruled on  
15 this -- sever Mr. Gonzalez out by himself, and let  
16 him go to trial by himself in July. And that way,  
17 the defendants in Counts 1 through 5, and those  
18 defendants who are not ready to proceed to trial in  
19 July have plenty of time. Because there is a concern  
20 that if Mr. Gonzalez is going to trial with  
21 defendants whose attorneys are not ready, that may  
22 also result in a problem and prejudice to Mr.  
23 Gonzalez, and not to mention those defendants. But I  
24 would submit to the Court, Your Honor, again, Mr.  
25 Gonzalez strenuously asserts his constitutional right

1 to a speedy trial. And we're ready. This is,  
2 essentially, a very brief trial as to Counts 14  
3 through 16.

4 THE COURT: Thank you, Ms. Johnson.

5 Any other defendants want to speak on the  
6 motion to continue?

7 All right. Mr. Castellano, are you going  
8 to argue this motion?

9 MR. CASTELLANO: Yes, sir.

10 THE COURT: You still want the motion to  
11 continue?

12 MR. CASTELLANO: Your Honor, Mr. Burke and  
13 Mr. Cooper accurately stated our position. If the  
14 group can move together, we would agree to some more  
15 time. The problem is there is a tension here between  
16 Mr. Gonzalez' speedy trial rights and the rest of the  
17 group's speedy trial -- or well, constitutional  
18 rights. I agree with everyone that, as it is, as it  
19 pertains to the statutory speedy trial issue, we  
20 don't have a problem because we have pending motions,  
21 we're not even on the clock right now.

22 But the constitutional issue is the issue  
23 that is really driving things here. So the question  
24 is whether or not the Court would be willing to move  
25 Mr. Gonzalez to a later date to keep him with the

1 group. And if so, we would not oppose a continuance  
2 to give the defendants more time. But if it's going  
3 to result in a severance -- it's basically a de facto  
4 severance -- to keep him at the July 10th setting, we  
5 just don't want to have that many trials. It's not  
6 economically feasible. It doesn't result in judicial  
7 economy. And we've already stated our position as it  
8 relates to the severance.

9 Now, looking at the motion to continue,  
10 itself, I think today and this week a number of the  
11 reasons for the continuance will disappear. So I  
12 think, regardless of the trial date, we'll be moving  
13 forward at a faster pace.

14 One of the issues listed in the motion to  
15 continue was the fact that the severance motion had  
16 not been decided yet. But that's been decided, so  
17 everyone knows kind of where they are in terms of  
18 order of trials.

19 The next -- one of the other ones was  
20 budgeting, and people not knowing how long the trials  
21 would be, in order to submit their budgets. I think  
22 we can sort that out as well.

23 And one of the other reasons was that the  
24 CI motions have not been decided. But I think we're  
25 going to have some concessions today or this week

1 that will largely take care of the CI issues. So I  
2 think, when it comes to the confidential informants,  
3 we're going to move past that pretty quickly this  
4 week, in terms of what will be disclosed. I think,  
5 with the exception -- as far as we know right now,  
6 with the exception of one person, we're likely to  
7 disclose the CIs, at a minimum, to counsel, for their  
8 eyes only. And then we'll have to make some  
9 decisions about what they can and can't discuss with  
10 their clients, or if they petition the Court to be  
11 able to make those discussions. But we'll discuss  
12 that when it gets to the CI motions. That's just a  
13 preview.

14 So I think that -- and I think, when it  
15 comes to discovery, we'll be moving along there as  
16 well, possibly. So I think a lot of the reasons --

17 THE COURT: You hear it, too, because  
18 you're in the courtroom with me, but there is just  
19 this constant refrain that the defendants are not  
20 getting the information either that I've ordered;  
21 they're requesting, it's been promised. I know we're  
22 going to take these motions one at a time, but do you  
23 have a general response that might go to the motion  
24 to continue here?

25 MR. CASTELLANO: I do have some response.

1 Without looking at each of the individual motions, I  
2 know the DNA evidence has been requested. We have  
3 submitted a request to the lab, and the lab is  
4 working on the DNA evidence. I've not received any  
5 indication at this point that they would not be able  
6 to produce some or all of what's been requested.

7 One of the requests, we have already  
8 disclosed DNA for one of the counts -- I forget which  
9 one -- but there has been a second request. We've  
10 also forwarded that to the lab. And they seem like  
11 they've been willing to accommodate. And they'll let  
12 us know if they can't.

13 We've responded to some of the discovery  
14 motions. On some, we just disagree about what the  
15 Court has ordered. One of them refers to the STIU  
16 files. Some of the files are thick and some are  
17 thin. And as far as I know, we've disclosed them as  
18 they were, with the exception of the redactions that  
19 were in the files.

20 THE COURT: So there is a confusion about  
21 my order?

22 MR. CASTELLANO: Yes. In terms of -- one  
23 example is the pen packs. So, for example, we went  
24 back to look at the Court's order, and what we stated  
25 in court. And one of the issues was whether or not

1 we had to submit pen packs on all the people  
2 requested. And I think our response in court was --  
3 it was Mr. Beck -- indicated that we had agreed to  
4 disclose a number of people, including I think  
5 defendants and victims, but there are other people we  
6 had not agreed to disclose. And that the defense, if  
7 they made a request, and there was a pen pack in  
8 existence at the time, that we would disclose that.  
9 But if there wasn't, then the defense would either  
10 pay the copying -- pay the fees for copying the pages  
11 as requested. So we went back and looked at the  
12 transcript. And that's been part of our response.  
13 So that's where I think there is some disagreement in  
14 terms of what's believed we need to disclose and what  
15 we actually have to disclose.

16 THE COURT: Okay.

17 MR. CASTELLANO: As I stated, if the Court  
18 is willing to move Mr. Gonzalez with the rest of the  
19 group, at least for some time -- I know under his  
20 constitutional speedy trial time a complex case buys  
21 you more time before you have to go to trial. And,  
22 of course, there are other factors for speedy trial.  
23 But if we can keep the case together longer, we don't  
24 oppose at least some sort of continuance that keeps  
25 us well within the constitutional range.

1 THE COURT: All right.

2 MR. CASTELLANO: Other than that, we feel  
3 like we would have to try the case in July, and keep  
4 everybody together.

5 THE COURT: Well, if I tell everybody in  
6 the room we're going to try this case on July 10, are  
7 you going to be ready? Is the Government going to be  
8 ready?

9 MR. CASTELLANO: Yes. It will be  
10 difficult, but we'll be ready.

11 THE COURT: All right. Thank you, Mr.  
12 Castellano.

13 Mr. Benjamin, anybody else want to say  
14 anything? Give you the last word on the motion to  
15 continue.

16 MR. BENJAMIN: Thank you, Your Honor, but I  
17 believe I've made all the arguments.

18 THE COURT: All right. Anybody else?

19 All right. Well, I'm going to deny,  
20 without prejudice, the motion to continue. I had a  
21 case a few years ago; defendant was sitting up there  
22 where Mr. Alonso was sitting, and he said -- it  
23 wasn't as big a case, but it had a lot of defendants  
24 in this room; probably a 19, 20-defendant case. He  
25 said, "I don't know anybody in this room. I want my

1 trial." And I'm not criticizing the Government. The  
2 Government said, Oh, you know, he's just as involved  
3 as everybody else. And it turned out that the  
4 Government's interpretation of some coded language  
5 was very incorrect. And he kept saying he wanted a  
6 speedy trial. And if I had not recognized that, and  
7 made everybody say, Well, let's put the Government to  
8 their proof, then I don't know how long that man  
9 would have stayed under charges.

10 And so, like I said, I'm trying not to  
11 judge this case in any way on its merits. So when  
12 Ms. Johnson stands up and says Mr. Gonzalez is not  
13 part of the SNM Gang, I'm not in a position to say  
14 one way or another. But it concerns me that I need  
15 to get her case to a trial.

16 I'm not inclined to give a de facto  
17 severance for the reasons I've already stated. So  
18 I'm going to deny the request. If y'all want to  
19 continue to talk and try to address some of the  
20 concerns that Ms. Johnson has brought on behalf of  
21 Mr. Gonzalez, then we can certainly relook at this  
22 down the road. But I think at the present time I  
23 need to take her concerns of getting her client to  
24 trial and demonstrate his innocence of these charges,  
25 I think seems to me paramount to the concerns about



1 getting this case ready for trial. So I'll deny the  
2 motion without prejudice, if we need to renew it down  
3 the road.

4 All right. Let me get my documents in  
5 order so we can take up the next motion. All right.  
6 This is the ex parte opposed motion -- I'm not quite  
7 sure what to do with all that -- for emergency  
8 hearing and expedited discovery regarding the  
9 clients' and families' safety. And I think the next  
10 motion is probably about the same, sealed opposed  
11 motion for emergency hearing and expedited discovery  
12 regarding clients and family safety.

13 I suggest we take these together. But let  
14 me just say this: I mean, I say this lightly. I'm  
15 having a little hard time taking these two motions  
16 seriously, because I don't know what you want me to  
17 do. I really just don't know what the defendants  
18 want me to do. So, you know, I mean, there are  
19 certain things a federal court can do. It can  
20 resolve disputes and things like that. But I really  
21 just don't know if this is really much of a  
22 justiciable controversy and what I can do about it.  
23 So, you know, I'll certainly listen. I'll be  
24 patient. But I guess I'm skeptical I can do  
25 anything. I can't solve all the problems. I mean,

1 if we've got one set of defendants wanting to do harm  
2 to another set of defendants, then I don't know what  
3 to do about that. I don't know of anything I can do  
4 about that. The marshals, I think, have kept  
5 everybody safe for months after months, so they're  
6 doing their job. I just don't know what needs to be  
7 done and can be done.

8 Ms. Sirignano, it's your motion, if you or  
9 Mr. Adams want to argue in support of it.

10 MS. SIRIGNANO: Your Honor, I'm going to  
11 defer to Team Troup, who has worked up argument on  
12 this motion.

13 THE COURT: Okay. Mr. Burke.

14 MR. BURKE: Your Honor, I think the primary  
15 reason that team Troup joined this motion is we  
16 needed information. It's true that the specific  
17 relief that we requested is amorphous, but we needed  
18 information, because we had this rather alarming  
19 document sent over to us, and we didn't really  
20 understand the full scope of it.

21 And I think it would be helpful for the  
22 Court to hear the testimony of FBI Agent Acee  
23 regarding this, because I think it fleshes out the  
24 facts a bit, and then I think we can all be at ease a  
25 little bit actually. But that was --

1 THE COURT: But is that really what a court  
2 does, make everybody at ease?

3 MR. BURKE: Well, we needed to ask somebody  
4 for discovery.

5 THE COURT: Why do you need discovery?  
6 Does it have anything to do with this case?

7 MR. BURKE: Because my client was  
8 threatened with death.

9 THE COURT: And how does that relate to  
10 this case? Tell me how that relates to what a  
11 federal court does with this case?

12 MR. BURKE: Well, I think actually the  
13 prosecution acted responsibly by giving us this  
14 information. But we needed to then get more  
15 information. For example, Your Honor --

16 THE COURT: Is this, though, the mechanism?  
17 Where we're having a hearing on getting ready for a  
18 trial, is this the mechanism by which we do that?

19 MR. BURKE: We thought so, Judge.

20 THE COURT: I didn't see a single case  
21 cited in any of the briefing. So what basis do you  
22 have for saying this is an appropriate forum for  
23 dealing with that?

24 MR. BURKE: Well, all of these defendants  
25 are under your custody and control, in effect, Your

1 Honor. And you have supervisory power over how --

2 THE COURT: I didn't see any cases cited on  
3 that.

4 I noticed that y'all read my opinion in Mr.  
5 Villa's case, where I went through carefully where I  
6 thought my powers were and where they weren't. But  
7 do you really have any cases that say just what you  
8 say you just said?

9 MR. BURKE: I think you're talking about  
10 the Folse opinion, which we did read, and it was read  
11 in conjunction with the tablets, Your Honor. And  
12 there, we cited paragraph 37, which talks about the  
13 Court's ability to exercise some control when it  
14 relates to the defense of the case. And I believe  
15 that the safety of the clients are --

16 THE COURT: Well, but that's a pretty broad  
17 statement. If you're just saying that anything  
18 that's having to do with the safety of the defendants  
19 relates to their ability to get good representation.  
20 I guess I think that's too tenuous.

21 MR. BURKE: Is the Court not interested in  
22 getting the information fleshed out regarding the hit  
23 list? Because I believe it actually is some  
24 clarification and comfort that might allow us to move  
25 forward with peace of mind. And I know the next

1 question is: Is the Court supposed to give peace of  
2 mind? But I thought it might be helpful to all of  
3 us. Because it was a matter of some concern, Your  
4 Honor, and we went to you, because you're the judge.

5 THE COURT: Isn't it a little bit just  
6 ancient history now.

7 MR. BURKE: I believe that's what Agent  
8 Acee would tell us.

9 THE COURT: Well, but how about you, Mr.  
10 Burke? Isn't it just ancient history, just another  
11 blip in this case?

12 MR. BURKE: It's not totally ancient  
13 history.

14 THE COURT: What would we use the  
15 information for?

16 MR. BURKE: If, for example, this  
17 information was a hit list crafted by a Government  
18 informant, and it turns out to be false information,  
19 that's Brady material. That is exculpatory because  
20 it reflects on the lack of credibility of a person  
21 who is providing information to the FBI. That would  
22 be relevant. It would be exculpatory.

23 THE COURT: All right. Anything else you  
24 wanted to say on your motion, Mr. Burke?

25 MR. BURKE: No, Your Honor.

1 THE COURT: All right. Thank you, Mr.  
2 Burke.

3 Who else? Anyone else want to speak on  
4 these motions, Mr. Davis?

5 MR. DAVIS: Thank you, Judge.

6 I know I did a joinder. Let me give you a  
7 little bit of history so the Court will understand, I  
8 think, why I joined in the concerns I think that the  
9 defendants have about the hit list. When the hit  
10 list first was provided to defense counsel, Mr.  
11 Herrera's name was not on that list, so it didn't  
12 really pertain to us.

13 THE COURT: And I'm not minimizing why  
14 people would be concerned about it.

15 MR. DAVIS: Yes.

16 THE COURT: I get that. Nobody wants to be  
17 on a hit list.

18 MR. DAVIS: Well, it's not so much that.  
19 It's the Government's use of a document that at some  
20 point they realize was false, and yet there is some  
21 indication that they were using it to try to convince  
22 witnesses in the case or pressure witnesses in the  
23 case that, in fact, they should cooperate with the  
24 Government. There has been a general feeling among  
25 the defense team that the Government has utilized

1 their resources to pressure witnesses.

2 THE COURT: Let me ask you what your  
3 thoughts are. I mean, I've got a little bit of a  
4 schizophrenic view from the defendants. Some thought  
5 that the Government acted responsibly by sending the  
6 list. Other people were highly critical of the way  
7 the Government has done the list. What's your  
8 thoughts?

9 MR. DAVIS: Well, my thought is I  
10 appreciate them sending the list. And I commend them  
11 for sending the list.

12 THE COURT: You'd rather have it than not  
13 have it.

14 MR. DAVIS: My problem is the way they used  
15 the list. They were taking that list and showing it,  
16 for example, to my client's mother saying, "Your son  
17 authored this list," when they knew he had not  
18 authored the list, and that somehow she should now  
19 cooperate with the Government.

20 THE COURT: Here's my problem. I think  
21 this was playing a little bit into what I was talking  
22 about with Mr. Burke. They get to do an  
23 investigation. And we know the Government does some  
24 investigations, and they don't always tell the truth,  
25 right?

1 MR. DAVIS: The Government doesn't tell the  
2 truth in their investigations?

3 THE COURT: Sometimes. I've sat here long  
4 enough to see the agent will say that is not a  
5 correct statement. So sometimes they do that, right?

6 MR. DAVIS: Well, I don't think they're  
7 supposed to deliberately lie and provide false  
8 information.

9 THE COURT: Really? Okay.

10 MR. DAVIS: I'm not saying that they don't.  
11 But I'm saying that they're not supposed to.

12 THE COURT: Well, where is that written?

13 MR. DAVIS: I don't know. That's maybe  
14 just the way I was brought up. I just didn't think  
15 the Government was supposed to do that.

16 THE COURT: Maybe you're right, given the  
17 lights just went out. That's a signal for me.

18 MR. DAVIS: I should probably sit down, I  
19 guess, Judge. But I think that's the gravamen of our  
20 position, that was clear that Mr. Herrera never  
21 authored this document. And it became apparent from  
22 the Government, informal discussions with the  
23 Government, that they were asserting that he was the  
24 author of this ridiculous hit list that's got his  
25 mother and his brother on there. And it was evident



1 early on from their investigation that he did not  
2 author this, and yet they were presenting it to  
3 witnesses indicating that he had tried to pressure  
4 witnesses. And we believe that is just a pattern of  
5 things that the Government has done to pressure  
6 witnesses, defendants, otherwise divide the defense  
7 team in the case, things of that nature. So that's  
8 why I raised the issue, Judge. Thank you.

9 THE COURT: I understand. Thank you, Mr.  
10 Davis.

11 Anyone else? All right. Who is going to  
12 respond? Ms. Armijo -- oh, we've got somebody in the  
13 back there.

14 THE COURT: All right. Mr. Esquibel?

15 MR. ESQUIBEL: Thank you, Your Honor.

16 On behalf of Mr. Garduno, part of the  
17 reason why we joined this is that this information  
18 becomes worthy of us investigating further, and  
19 needing for our investigation, as there has been  
20 other instances in discovery -- there is two phone  
21 calls back in September of 2015, where information  
22 was given to Special Agent Acee about my client being  
23 on a hit list.

24 Now, for our purposes, I think this is  
25 important as part of our defense to understand what

1 they do with this information once they get it.

2 In one of the September calls, there is  
3 conversation, I guess you could say, between the CI  
4 and Special Agent Acee. In another one, it's brought  
5 up, and then dismissed by Special Agent Acee. Where  
6 this becomes important to us is how they investigate  
7 and how they handle the investigation of these  
8 things. Why is it that some of this information gets  
9 investigated, and why is it that others is ignored:  
10 And we have this information where what the  
11 Government does --

12 THE COURT: But you understand that the  
13 Government gets to do that. That's just their  
14 discretion. They get to investigate this and not  
15 investigate that, right?

16 MR. ESQUIBEL: And that's understood. And  
17 then we get the ability to call them on their  
18 lackluster --

19 THE COURT: Really?

20 MR. ESQUIBEL: I think at trial that  
21 becomes our ability to do that. Because if they're  
22 claiming that these individuals are dangerous or that  
23 this is something that is so important that it has to  
24 be brought before this Court, and then they don't  
25 investigate, we need the ability to call them out on

1 that and dig deeper into it.

2 And when we have these things, what happens  
3 is that the Government gets this information from an  
4 informant, and then they go forward, and you don't  
5 know if a month from now these are going to turn into  
6 more charges.

7 And I'll give the Court the example --

8 THE COURT: I will bet you we're not going  
9 to get more charges in this case, right?

10 MR. ESQUIBEL: 1613?

11 THE COURT: DeLeon. They may come up with  
12 another case, right? But as far as this case, I bet  
13 it's frozen.

14 MR. ESQUIBEL: I wouldn't put anything past  
15 the Government, Your Honor.

16 THE COURT: Well, you and I got to make  
17 good bets, right? We've got to figure out -- use our  
18 brains as to what's going to happen. Probably in  
19 this case there is not going to be any more charges.

20 MR. ESQUIBEL: We would hope not, Your  
21 Honor. But everybody loves a long shot, so --

22 THE COURT: You don't want more charges,  
23 right?

24 MR. ESQUIBEL: No, Your Honor. But what we  
25 want to do is protect from when there are CIs who

1 come forward and make a statement, and then every  
2 other defendant is somehow harmed by it, such as the  
3 tablet issue that we're going to have later, such as  
4 new overt acts that were lodged against Mr. Garduno.  
5 And on top of that, finding out when we actually need  
6 to be concerned with the safety of our own clients,  
7 when the Government may not be.

8 And those are all things that we need to  
9 investigate, and we need to look into further. And I  
10 think that a little leeway to be able to question and  
11 delve into these issues should be allowed in these  
12 situations. They're unprecedented, we understand  
13 that. And there's nothing there. But sometimes you  
14 have to go against that to try to figure out what's  
15 best for the persons -- our defendants and their  
16 safety.

17 THE COURT: All right. Thank you, Mr.  
18 Esquibel.

19 Anyone else? Any of the other defendants  
20 want to speak on this?

21 All right. Ms. Armijo, do you want to put  
22 Mr. Acee up here and let him put everybody's mind at  
23 peace?

24 MS. ARMIJO: No, Your Honor. We don't feel  
25 that that's necessary in this case, because I think

1 the Court is correct. There is no judicial  
2 controversy in this case. There is no basis for any  
3 relief. And we have --

4 THE COURT: Let me ask you: Have you  
5 thought through the suggestion that there may be some  
6 Brady here -- material -- that there may be something  
7 that they could use against these CIs or something  
8 like that? Because you know the evidence. Have you  
9 put your foot in the shoes of these defendants and  
10 see if there is any way they could use this?

11 MS. ARMIJO: Well, it's not a Government  
12 CHS in this case, so --

13 THE COURT: No. But if you've got some  
14 information that's just -- that's Brady material,  
15 however it could be used by the defendants, have you  
16 thought about that?

17 MS. ARMIJO: I have. And we can think  
18 about it a little bit more, but the situation was one  
19 that we got information, and we notified -- whenever  
20 we get this information, we notify the US Marshal  
21 Service so they're aware of it. And there was an  
22 investigation that was immediately launched into it.  
23 There was additional investigative steps, which we  
24 would not like to disclose for the reason that, in  
25 the future, if there are these types of threats, we

1 don't want people in this room to know what  
2 investigative steps we took.

3 But the FBI investigated it, and they  
4 determined that it was not a valid threat. And they  
5 did notify people as necessary on the outside. The  
6 people that were on the list that are in this room.  
7 The US Marshal's Office obviously takes care of them.  
8 But we determined that it was not a valid threat. We  
9 have informed people that. They've been provided  
10 with the list itself in our response.

11 THE COURT: What do you think -- tell me  
12 what you think the present situation is. Without  
13 revealing any sort of investigative details or  
14 things, tell me what you think of this list now.  
15 What's your thoughts about it?

16 MS. ARMIJO: This list, we think it was  
17 fake. We think that it's not a Government CHS in  
18 this investigation. But it was somebody that was,  
19 for whatever reason --

20 THE COURT: Help me a little bit. When you  
21 use the word "Government CHS," what's a Government  
22 CHS versus a nongovernment?

23 MS. ARMIJO: What I mean is it's not a CHS  
24 in this case, in the SNM case.

25 THE COURT: Okay.

1 MS. ARMIJO: It was somebody that wanted to  
2 be a CHS for the United States, and providing  
3 information, but it was not somebody that we have  
4 involved in this case.

5 THE COURT: So what you think it was is  
6 somebody who wanted to get some benefit from  
7 approaching the Government with a hit list, and so  
8 they made this list up?

9 MS. ARMIJO: Yes.

10 THE COURT: Okay. And it's not one of the  
11 current CHSs?

12 MS. ARMIJO: No.

13 THE COURT: Okay.

14 MS. ARMIJO: No, it's not. And so the FBI  
15 used special techniques to investigate it, and  
16 determined that it was not a valid hit list. And so  
17 I think that it's just -- as to Mr. --

18 THE COURT: So it's rearview mirror for  
19 you?

20 MS. ARMIJO: It is. And I think it's just  
21 a fishing expedition for them to try and get Agent  
22 Acee on the stand to try and find out information.  
23 And we just don't need to go there at this point.

24 THE COURT: If he got on the stand, is that  
25 basically what he would say as well?

1 MS. ARMIJO: Yes.

2 THE COURT: You're making a proffer as to  
3 what he would say?

4 MS. ARMIJO: Yes, Your Honor.

5 THE COURT: Anything else you can say that  
6 would give comfort to these defendants and their  
7 families about this hit list?

8 MS. ARMIJO: It's not a valid hit list.  
9 And the FBI investigated it fully.

10 THE COURT: And it took you a while to  
11 figure that out?

12 MS. ARMIJO: Well, I don't know about "a  
13 while." When we got the information, we --

14 THE COURT: When you sent it over, you  
15 probably didn't know?

16 MS. ARMIJO: When we sent it over, we were  
17 notifying them, but we were still in the  
18 investigative stage. I believe that at the time I  
19 filed my response, I indicate there that we were  
20 doubting its authenticity. And after filing my  
21 response to their motion, we pretty much don't  
22 believe it's a valid list. But even in my response I  
23 indicate that. And the actual list itself was  
24 provided.

25 THE COURT: Okay. All right. Anything



1 else on these two motions?

2 MS. ARMIJO: No, Your Honor.

3 THE COURT: All right. Thank you, Ms.

4 Armijo.

5 Mr. Burke, what else? What do you want to  
6 do? I know you'd like to get Mr. Acee up here,  
7 and -- but what else do you really need?

8 MR. BURKE: No. Actually, Your Honor, I  
9 very much appreciate your question and answer with  
10 the prosecutor. It was interesting that she  
11 acknowledged that people will make things up in order  
12 to get favors. That's the kind of thing that we look  
13 for with CHSs. And I understand the distinction that  
14 this particular CHS, the Government doesn't intend to  
15 use, or is now saying it's not a Government CHS.  
16 That's an important and helpful clarification for us.  
17 And it was also important to learn that when --

18 THE COURT: It kind of reduces the chance  
19 that we've got any Brady material here, doesn't it?

20 MR. BURKE: It does. But I will say -- and  
21 I understand the Court's position very well. What  
22 are you supposed to do? But it would have been nice  
23 to have this information on March 23, as opposed to  
24 May.

25 THE COURT: Well, if I understand what

1 they're saying, they're saying they just didn't know  
2 right that moment when they sent it over. They were  
3 still doing their investigation. I don't know. It's  
4 hard to figure out what to do when you have got one  
5 of these things floating around.

6 MR. BURKE: Things would have sped up if  
7 Your Honor was involved.

8 THE COURT: I understand.

9 MR. BURKE: Thank you, Your Honor.

10 THE COURT: All right. Thank you, Mr.  
11 Burke.

12 All right. Unless anybody has anything  
13 else they want to say on either one of these motions,  
14 the Garcia motion or -- I think Garcia filed it in  
15 all the cases -- and I'm going to deny those motions.

16 All right. Let's talk about the tablets.  
17 We'll do this in the context of Mr. Perez' motion.  
18 But let me make a few comments. Last week in  
19 Mr. Garcia's case, I think the Government has  
20 indicated -- and probably everybody knows this --  
21 indicated they don't think the tablets are a workable  
22 system anymore. So I'll let the Government put it in  
23 their own words, but I think that was basically what  
24 they were saying.

25 So what do we do? Well, I encouraged the

1 Government at that time, before we got together  
2 today, to approach the facilities to see if we could  
3 start storing large amounts of information at the  
4 facilities. So we'll see what they've learned. But  
5 it seems to me we've just got to do it old school.  
6 The tablets predate me. That was an agreement -- and  
7 I've read the transcript, so I do think I'm fair in  
8 saying it was an agreement -- between the defendants  
9 and the Government to use these tablets to try to  
10 address some concerns.

11 I think that a lot of concerns about the  
12 CIs, some of the confidential information is  
13 beginning to wane as we go on. My experience in this  
14 case is that people know a tremendous amount about  
15 who the people are, who the CIs are. There is not a  
16 whole lot of secrets left.

17 And so I'm inclined to push the parties,  
18 just to figure out how to get these documents in the  
19 facilities and the defendants can review them.

20 But I'm open to suggestions, if people have  
21 got a better way to do it. But it seems like the  
22 tablets are not a workable solution anymore. You  
23 know, I know that not all the guys in here or  
24 defendants in here were responsible for the problem  
25 with the tablets that caused the marshals and the

1 prison system to get concerned about these floating  
2 around. But come on, guys, you've got to help me out  
3 here. I'm trying to get these materials into your  
4 facilities. You did something that Dell hadn't even  
5 figured out how to do. So help me out with this.

6 All right. Mr. Villa, those are my  
7 thoughts. Just got to go old school here. But I'm  
8 open to suggestions.

9 MR. VILLA: And, Your Honor, with all due  
10 respect, I think the person/persons you need to be  
11 speaking to aren't in the room today. Because the  
12 person that figured this out or caused this issue was  
13 one of the confidential sources, confidential  
14 cooperators.

15 THE COURT: You may be right, but I don't  
16 know.

17 MR. VILLA: Well, I think that was the  
18 reason the Court put in place the protective order,  
19 which set out very clearly --

20 THE COURT: Well, when I redid what Judge  
21 Gonzales did, I can tell you I wasn't thinking of  
22 this at all.

23 MR. VILLA: And, Your Honor, I understand  
24 that. But my point is that there has to be some  
25 individualized suspicion here. There has to be some

1 issue --

2 THE COURT: Well, here's the problem is, I  
3 think you're blaming it all on this table over here  
4 or on the Court. The problem is I don't think the  
5 parties that are in -- the people that are making  
6 this decision about the tablets are really people I  
7 can tell them to do anything about it. It's the  
8 marshals and the Corrections Department.

9 MR. VILLA: And, Your Honor, I'm not --

10 THE COURT: So, I mean, you know, I don't  
11 think that I can tell the Corrections Department and  
12 the marshals to make individualized determinations.  
13 They've got to run their facilities and do their job.  
14 And so I guess I'm not sure how -- that may be a  
15 great idea to have individualized determinations, but  
16 I don't think it's an option for us.

17 MR. VILLA: Well, Your Honor, I'm not sure  
18 there is a better solution, whether we go old school  
19 with paper or laptops or computers. I mean,  
20 regardless of the situation, if some cooperating  
21 witness or any one of these defendants, as far as I  
22 know have all complied with the Court's orders, does  
23 something, does that mean that everybody loses their  
24 paper, everybody loses their computer? I mean,  
25 that's the issue that --

1 THE COURT: Well, if I've got the marshals  
2 and I got the prison system saying they're not going  
3 to allow these tablets in -- and I think that's the  
4 situation.

5 MR. VILLA: I don't think that is, Your  
6 Honor. And I may be wrong, I may be missing some  
7 information.

8 THE COURT: And I don't think this is Ms.  
9 Armijo over here telling us that she's got any  
10 control over this. If she does, then maybe you're  
11 right. But assume with me for a second she doesn't.  
12 The people sitting over at this table cannot tell the  
13 marshals and the prison systems, the detention  
14 centers, what to do.

15 Now, tell me what we do. Just humor me,  
16 and assume that's the situation.

17 MR. VILLA: Well, Your Honor, there has to  
18 be some give. I mean, let's say the marshals and the  
19 detention center say: They can't have anything in  
20 here, period, and we don't care what the Court or  
21 anybody else has to say about that.

22 So you have to take that argument to its  
23 logical conclusion, whether it's laptops, tablets, or  
24 paper, if the detention center says: You can't bring  
25 it in here, sorry; then we need to know that.

1 Because I was never under the impression, from what's  
2 been filed, at least in DeLeon -- I don't have the  
3 information on the other cases -- that that is the  
4 issue. The issue is these tablets, which we were  
5 told were going to be secured may not be secured, and  
6 we need to think about a solution. But why the  
7 tablets were seized, whose call it is to let the  
8 tablets back in, none of that information has ever  
9 been -- have I ever been privy to.

10 My understanding was that based on the  
11 notice that was filed by the Government, which  
12 basically indicated that a cooperating witness  
13 figured out a way around the Wi-Fi issue, that the  
14 tablets were all seized. Not that the tablets that  
15 any of our clients had had actually done the same  
16 thing; that they had actually taken them and gotten  
17 their way around the Wi-Fi issue, just that it is a  
18 possibility.

19 And now we're hearing that it's a  
20 possibility that Dell, or Microsoft, no one else can  
21 address. But that's a separate issue of when and  
22 under what circumstances is it appropriate to seize  
23 tablets or paper or laptops, and whose call is that,  
24 right?

25 So the way I've looked at this issue is one

1 person figured out a loophole, and therefore, they  
2 seized all the tablets. And the way I read the  
3 protective order is an individual's tablet has to  
4 have some indicia of violating a protective order,  
5 has contraband, is broken, is being used improperly,  
6 before that particular tablet can be seized. And  
7 that's going to be an issue in the future no matter  
8 what we decide, whether we decide it's paper or it's  
9 computers, or what it is. We need to have a  
10 understanding about when the Government can do that.

11 THE COURT: Well, I think probably we all  
12 need to write a protective order that actually is  
13 effective against third parties. I mean, we can come  
14 up with a protective order that binds the Government,  
15 that the Court says it will enforce, the defendants  
16 agree to. But the problem is we don't -- we have  
17 limited control over prisons and detention facilities  
18 and the US Marshal. That's where I think we're  
19 running into some issues.

20 MR. VILLA: That's right. And I may be  
21 missing a big chunk of information. But, for  
22 instance, Mr. Perez goes to the Torrance County  
23 Detention Facility. Here in the courtroom today is  
24 Harlan Anderson, the head of the Security Threat  
25 Group for Torrance County. And I've asked him, you



1 know, by way of proffer: He says there is Wi-Fi at  
2 the facility, but it's secured. There is no  
3 unsecured Wi-Fi. So if any one of these --

4 THE COURT: Here's the problem that they  
5 told me last week with Mr. Garcia is: It doesn't  
6 matter whether there is Wi-Fi. Somebody can throw a  
7 phone over, it can be near a place; that's what  
8 they're telling me. So that's the reason that the  
9 marshals and the prison system are doing this. I  
10 mean, I agree with you, they don't have Wi-Fi there.  
11 But the problem is that, once they have a device that  
12 can be used, that that's a problem. I mean, that's  
13 the reason they don't let cellphones in. Even though  
14 they don't have Wi-Fi, they can still get a hot spot  
15 on a phone and transmit. So the problem is -- I read  
16 all that about, you know, there is not Wi-Fi, and I  
17 understand that, and agree with that. But that's --  
18 the problem is that we all know there can be hot  
19 spots created by all sorts of things. And that's the  
20 reason they're doing what they're doing.

21 MR. VILLA: Well, and the same cellular  
22 devices that would create a hot spot could just be  
23 used by anybody in the facility to send messages,  
24 take a picture of the discovery, send it to whoever  
25 they need to. It doesn't fix the problem, Your

1 Honor. There is no way to keep a detention center  
2 cellphone free. It's sort of an endless struggle  
3 that they have.

4 So whatever our solution is, let's say we  
5 switch to paper, we switch to laptops -- and I've  
6 used laptops with my clients at Torrance County  
7 Detention Facility before, without having to go  
8 through the court -- but whatever the solution is, if  
9 a cooperating witness and Mr. Acee have an afternoon  
10 together, and they have figured out a way that they  
11 could smuggle in a phone and take a picture of some  
12 really important discovery, or some discovery that  
13 names a cooperating witness, and send that to, you  
14 know, everybody that they can, because they have a  
15 cellphone, and you can basically broadcast it to the  
16 whole world, does that mean we lose all our paper?

17 THE COURT: Well, but you understand -- I  
18 mean, this was one of the issues that we had in  
19 Garcia last week is -- they've got rules against  
20 having cellphones in the cells. And I think there is  
21 laws and regulations on that. So they do prohibit  
22 those.

23 MR. VILLA: But those same rules defeat the  
24 argument that these tablets can hook on to one of  
25 those cellphones that would be illegal and then be

1     able to transmit.

2                 THE COURT: I guess I'm missing the point.  
3     If they don't allow cellphones -- I mean, I can't  
4     make a rule based upon somebody illegally having a  
5     phone, can I?

6                 MR. VILLA: No. And I think that's my  
7     point.

8                 THE COURT: So I guess I'm not tracking  
9     here.

10                MR. VILLA: Well, my point is: If you have  
11     a tablet, and you don't have unsecured Wi-Fi, which  
12     might be available at Sandoval County because of the  
13     nearby businesses, the only other way to get Wi-Fi  
14     would be to hack the password that the facility uses,  
15     or have a device, which would be a cellphone, that  
16     would create a hot spot. And the facility has  
17     rules -- I'm sure they have rules related to the  
18     security of their Wi-Fi. And, as the Court points  
19     out, they have rules prohibiting cellphones. So the  
20     tablets, as long as the facility is doing its job  
21     enforcing their rules -- which we assume they are --  
22     are not going to be able to be used for Wi-Fi. The  
23     other piece of that, so they can't hookup to a phone,  
24     because the phone would be illegal, and they can't  
25     get into the Wi-Fi because would be illegal. And we,

1 as defense counsel and the correction officers and  
2 others, can -- there is a way they can keep an eye on  
3 that, monitor that, without blowing up this whole  
4 deal that we've all worked so hard to get in place.

5 And, you know, I think my understanding is,  
6 if someone uses one of these tablets and gets around  
7 the security procedures, that it essentially deletes  
8 all of the discovery. So if one of the defendants  
9 who has an interest in viewing their discovery --  
10 unlike perhaps a cooperating witness -- decides I'm  
11 going to figure this thing out, and I'm going to get  
12 capability to connect to Wi-Fi or to a hot spot,  
13 they're going to lose all their discovery so they're  
14 doing themselves a disservice.

15 THE COURT: So if I understand what you're  
16 saying is it's just not a big problem, right?

17 MR. VILLA: That's my position, that we can  
18 give these back to the defendants. And certainly --

19 THE COURT: So you want to make it work;  
20 you want the tablets back and continue the tablet  
21 system?

22 MR. VILLA: I want that, Your Honor. And I  
23 think that a big issue with paper, or whatever we do  
24 if we blow up the tablet system, is the audio, and to  
25 a lesser extent video, that we have in the discovery.

1     There is, just for Mr. Perez alone, dozens of audio  
2     recordings that he needs to listen to. We've learned  
3     this morning that we'll be tried alongside the counts  
4     related to Gregg Marcantel. And there are thousands  
5     of audio recordings there that I think Mr. Perez, if  
6     he's going to sit through that trial, is entitled to  
7     listen to along with all the other defendants. There  
8     has got to be a mechanism for that. And whatever we  
9     use, if it's a laptop, a tablet, some device, and if  
10    there is some way that it could connect to some  
11    illegal cellphone, we're going to be in this same  
12    box, the way I see it.

13             I think you give the tablets back. You  
14    keep the procedures in place so that defense counsel,  
15    the corrections officers, the facilities can do what  
16    they need to do to make sure that the systems have  
17    not been compromised, and we march on.

18             Because I don't know where you're going to  
19    put 100,000 pages of discovery per defendant. I  
20    don't know where you're going to put --

21             THE COURT: Is it 100? I thought it was  
22    50. Is it 100?

23             MR. VILLA: Well, I may be overstating  
24    that, Your Honor. I don't have the current figures  
25    at my fingertips. But let's assume it's 50,000.

1 These cells won't fit 50,000 boxes of discovery. And  
2 each defendant would be entitled to that. And then  
3 they need to listen to their audio recordings, video  
4 recordings. There are photographs and other digital  
5 media that they're entitled to review as part of the  
6 discovery.

7 You know, I read this weekend in the Wall  
8 Street Journal that El Chapo has a laptop, all right?  
9 So, I mean, if the Government can figure that out, I  
10 think they could figure out this case. You know, I  
11 mean, I know that there are -- the other remedies  
12 that are out there are going to take a long time.

13 My memory of one of the delays of the  
14 tablets was the Department of Corrections had them  
15 and were trying to disable these security features.  
16 They did that. And it's my understanding there is  
17 essentially a check-in place. You get around the  
18 security feature, you lose all your discovery; not to  
19 mention it's going -- your tablet is now going to be  
20 subject to seizure. If Mr. Perez decides to do that,  
21 then maybe he isn't entitled to his discovery. But  
22 until he does that it shouldn't be taken away,  
23 especially on the basis that the Government has  
24 stated in the notice of cause. You know, if you want  
25 defense counsel to routinely check it and report to

1 the Court that the tablets have not been overwritten,  
2 that the discovery is all still there, you know,  
3 maybe we can add an extra layer of protection, amend  
4 the protective order in some small fashion. I mean,  
5 we're all officers of the court.

6 You know, it's not like our clients are  
7 going to be put back into jail if they decide to do  
8 this. They're just going to lose their right to  
9 discovery, and that's going to be their problem. But  
10 I don't think we need to go nuclear on this.

11 THE COURT: All right. I know that some  
12 other folks joined this motion. But do you have a  
13 sense? Is that where all the defendants are? They  
14 just want the laptop back and go back to where we  
15 are? I didn't have as good a feeling from when I was  
16 talking to Mr. Garcia last week that that was  
17 necessarily where he was. It may be.

18 MR. VILLA: And I'm not certain. I think  
19 there was some sense that the return of the tablets,  
20 that the ship had sailed. And, frankly, I just  
21 wasn't willing to give up on that. So I'm not sure  
22 where the rest of my colleagues are. But I certainly  
23 think that they -- you know, we signed on for the  
24 tablets. I'm sure that they would agree that that's  
25 an easier option, especially those that may be going

1 to trial sooner rather than later, than trying to  
2 think of something new. But I guess I'll let them  
3 speak.

4 THE COURT: All right. I may have  
5 questions for you a little bit later, Mr. Villa. But  
6 I think that's it. Thank you, Mr. Villa.

7 Ms. Sirignano.

8 MS. SIRIGNANO: Thank you, Your Honor.

9 Your Honor, while I don't disagree with my  
10 colleague, Mr. Villa, we just need to get this  
11 discovery back in the hands of our clients. And I  
12 think a proposal from the Government this morning was  
13 to have a computer, possibly a laptop with a hard  
14 drive, in each facility, so they're able to access  
15 the discovery.

16 My proposal would be -- and I talked to Mr.  
17 Lowry about it -- that each client, instead of using  
18 CJA funds to copy 50,000 or more pages of documents,  
19 that CJA funds be used to purchase a laptop computer  
20 for each client, that the marshals and the Department  
21 of Corrections and the warden of each facility --

22 THE COURT: We probably aren't going to  
23 purchase, the federal government, laptops.

24 MS. SIRIGNANO: So --

25 THE COURT: So what's the next proposal?



1 MS. SIRIGNANO: Well, I guess if CJA funds  
2 can't be used, then I'm willing to shell out \$300 or  
3 \$400 myself to get the discovery back in my client's  
4 hands, Your Honor. To me, it would seem that it  
5 would be -- we would incur more funds copying 50,000  
6 pages of discovery in hard form, and they wouldn't  
7 have access to it all at once, as each facility, as  
8 you know, has restrictions on how many pages each  
9 client can have at each time. And so my proposal  
10 would be to allow the client to have a laptop that  
11 has no Wi-Fi capability whatsoever, and get this  
12 discovery back to our clients right away.

13 Thank you.

14 THE COURT: Well, I just -- I mean, I can  
15 check, but I just don't think it's probably going to  
16 be realistic for the federal government to buy 30 or  
17 40 laptops. I just -- I can't see that. But I don't  
18 mind checking on it.

19 Mr. Lowry. So I think I'm going to have to  
20 have another proposal from the defendants as to what  
21 they want to do.

22 MR. LOWRY: Your Honor, I just wanted to  
23 clarify, and I join both my colleagues. My client,  
24 Mr. Baca, has had nothing to do with this data  
25 breach, security breach, whatsoever. And in fact, I

1 think this issue, frankly, dovetails with the motion  
2 to continue, in the sense that our clients have a due  
3 process right to review the discovery in this case.  
4 And my client has really only had a functional tablet  
5 for about four to five months. And now that's been  
6 stripped away from him.

7 And, you know, there is quite a high  
8 utility in our clients having the discovery in this  
9 case. As we all know, it's an exceedingly complex  
10 case. And we rely mightily on our clients to help us  
11 sift through this material.

12 I'm going to second Ms. Sirignano's  
13 comment. If I can't get the Government to compromise  
14 to what I think is a just and reasonable solution in  
15 a laptop, I would certainly expend my firm's own  
16 funds. And what I want to do here -- and I've looked  
17 into this during these conversations -- is,  
18 unfortunately, what you need is a bit of a jalopy  
19 laptop, one that doesn't have Wi-Fi capability, one  
20 that doesn't have an internet camera, one that  
21 doesn't have the features that the Government is  
22 concerned about individuals using or accessing in  
23 facilities.

24 And I don't doubt the sincerity of that  
25 concern. But what I'm trying to do is work a

1 solution here. And the solution really isn't going  
2 to be: Give our clients five to ten banker's boxes  
3 of material in their cell. I mean, the facilities  
4 aren't going to agree to that. But I think, if we  
5 have a jalopy laptop, with a stand-alone hard drive,  
6 we could be right back where we were.

7 And I hear the Court's concerns, "I can't  
8 order the facilities to do this. I don't want to  
9 order the marshals to do this." But both the  
10 facilities and the marshals have already demonstrated  
11 a willingness to allow devices in the cells. Their  
12 only concern is internet capability and the  
13 photography capability. And if defense teams work a  
14 solution that eliminates that threat 100 percent from  
15 this device, I don't see why that isn't a viable  
16 solution.

17 THE COURT: Well, but -- those are all sort  
18 of reasonable things, but have you sat down with the  
19 marshals and sat down with the Corrections  
20 Department, and say: Can we do this for our clients?

21 MR. LOWRY: I'm happy to do that, Your  
22 Honor. In fact, I'm glad you brought that up.  
23 Because when the U.S. Attorneys filed their statement  
24 of cause for why these laptops were seized, they sent  
25 out an email to the various defendants saying: We'd

1 love to sit down with you and examine your client's  
2 laptop. And I responded immediately. And I said,  
3 "Fine, let's do that this afternoon.

4 "Oh, wait, we didn't mean today.

5 "Let's do it tomorrow morning.

6 "Well, we can't really do it tomorrow  
7 morning.

8 "Well, let's do it next week."

9 And I still haven't received my invitation  
10 to come in and talk to the United States or the  
11 marshals.

12 So it's not that I haven't tried, Your  
13 Honor. I'm more than happy to continue that  
14 conversation with the appropriate entities and  
15 authorities. But I want to emphasize -- emphatically  
16 so -- that my client, Mr. Baca, hasn't ever tampered  
17 with his tablet. We were willing to prove that to  
18 the United States. They declined the offer.

19 And I agree with Mr. Villa that it's a  
20 fundamental disservice and a violation of due process  
21 to deprive my client of his right to review the  
22 evidence that's going to be used against him at  
23 trial. And this is, again, problematic in the sense  
24 that this is just going to cause us to need -- and  
25 require more time to prepare for the inevitable

1 trial. Your Honor, we'll work with all the  
2 appropriate authorities to resolve this in a way that  
3 secures the facilities and everyone involved. But I  
4 think that can be done. And I would urge the Court  
5 to consider that to be done with electronic gear, if  
6 not the tablets themselves, and my understanding is  
7 the tablets, unfortunately, are getting ready to  
8 outlive their utility because the memory is going to  
9 be stripped probably in the next round of discovery  
10 or two, so we're going to have to move to an  
11 alternative device anyhow.

12 THE COURT: Yeah, it seems to me that these  
13 tablets -- there is a host of reasons -- you're  
14 giving some more. But I think that's the reason the  
15 tablets have sort of -- a lot of people have sized it  
16 up. So I'm a little surprised by Mr. Villa wanting  
17 the tablets back, given that other people are telling  
18 me that it's not going to work anyway.

19 MR. LOWRY: Well, I think it's a stopgap,  
20 Your Honor. I mean, it's very important for the  
21 clients to have the material. I know my client  
22 reviews his material on a daily basis. And it's  
23 important for him to have this, to work with his  
24 counsel in preparing for trial in this matter. So I  
25 don't think it's unreasonable to say: If we can

1 demonstrate that our clients haven't violated the  
2 protective order -- and I don't disagree with what  
3 Mr. Villa said -- if we can set up a periodic review  
4 with a local jail authority or a representative from  
5 the U.S. Attorney's Office -- I mean, I think some of  
6 my colleagues would bristle at that thought. But my  
7 position is it's more important for Mr. Baca to have  
8 access to the discovery so we can work  
9 collaboratively on his defense. And the denial of  
10 that is working a fundamental injustice to this case.  
11 And this is an ongoing problem.

12 So I think we've done this in this district  
13 before. I've had a terrorism case out of Canada that  
14 somehow I had a Canadian here at the RCC, who was in  
15 US Marshal custody who had a laptop, and had external  
16 hard drives. So I have firsthand experience. This  
17 isn't an overwhelming or debilitating problem. This  
18 can be fixed. And we've done that here in this  
19 district. And there is no real impediments to  
20 effectuating a solution that I described with a  
21 laptop and an external hard drive, Your Honor.

22 THE COURT: All right. Thank you,  
23 Mr. Lowry.

24 Mr. Benjamin.

25 MR. BENJAMIN: Thank you, Your Honor.

1           Your Honor -- and I would like to direct  
2           the Court to the point that I have a laptop at Otero  
3           in another individual's custody right now that he is  
4           using at that facility. And so I know personally  
5           that Otero will accommodate the issues.

6           THE COURT: So, if that's the case, why  
7           aren't y'all individually taking care of this  
8           problem?

9           MR. BENJAMIN: Your Honor, I would direct  
10          the Court to what I would refer to the  
11          heavy-handedness of the Government's response in this  
12          matter. The protective order specifically directs  
13          that an individual -- a guard is how it's  
14          referenced -- can review -- can ask to have the  
15          tablet logged on, and done. However, the tablet has  
16          been seized and taken out of our possession. So  
17          that's why I'm here, along with Mr. Villa, asking the  
18          Court to request the return of this. The tablet is  
19          no different than any other media that could be used  
20          and abused. And to simply decide that it's a tablet,  
21          it's new, it's different, and therefore, it's used  
22          and abused incorrectly, I don't think is fair; and,  
23          two, causes a lot of concern with the Court's denial  
24          of essentially our motion to continue, and less than  
25          60 days to go to trial.

1           So, Your Honor, there is software out  
2           there. Fortress software is a \$60 piece of software  
3           that can be loaded on a laptop. I take issue with  
4           the representation that Dell and Microsoft were  
5           contacted, but yet there has been nothing put forth  
6           to say that, other than simply: I've been told that  
7           they did this. This is just a very heavy-handed  
8           response to interfere with my client's ability to  
9           review his discovery, is how it feels from our point  
10          of view, Your Honor.

11           And so I think that this possibility that  
12          cooperators who, I don't know why they still have  
13          their information, as opposed to defendants who are  
14          prepping for trial, have been ordered to trial, that  
15          their risk use of this use of Wi-Fi outweighs the  
16          prejudice the defendant has to the right that he has  
17          to review the discovery. Especially when all three  
18          people before me, Your Honor, have articulated what I  
19          would urge the Court.

20           There has been nothing to show that Mr.  
21          Gallegos did anything, committed any of this. This  
22          was a cooperator in the presence, and I believe in  
23          conjunction with Agent Acee, that is what is driving  
24          this whole --

25           THE COURT: Well, we'll find out in a



1 minute. But I think, unless I got the wrong  
2 impression of the hearing last week, Mr. Acee is the  
3 messenger. He's not the person that's doing this.

4 MR. BENJAMIN: My belief is he was the  
5 individual in the facility with the cellphone that  
6 provides the opportunity and basis for this, Your  
7 Honor.

8 But more specifically, there is nobody that  
9 has --

10 THE COURT: I'm sorry? What --

11 MR. BENJAMIN: I would --

12 THE COURT: You'll have to spin that out  
13 more than --

14 MR. BENJAMIN: Your Honor, he's a federal  
15 agent. I believe he took his phone into the  
16 facility. So there was a phone in that facility as  
17 well, and Sandoval is a different facility that has  
18 the ability to connect to Wi-Fi. And so the only  
19 evidence we have is that this occurred with Agent  
20 Acee, I believe, is how it was demonstrated. We have  
21 no evidence that any of the individuals sitting at  
22 these tables were the people that did this. And  
23 so --

24 THE COURT: I'm still -- I don't mean to be  
25 dense, but tell me what you're accusing Mr. Acee of

1 doing.

2 MR. BENJAMIN: Your Honor, it's very --

3 THE COURT: Spin it out.

4 MR. BENJAMIN: Your Honor, he's with a  
5 cooperator, he was there, and a tablet was used to  
6 communicate. And I think that, based upon the  
7 Government's emails that the tablet issue is dead,  
8 and they're just changing this, I am very suspicious  
9 of the fact that, based upon things that have  
10 specifically happened with Mr. Gallegos, statements  
11 that were made, statements that he's being prosecuted  
12 for, and statements that have been retracted, that  
13 this is simply a concern for security. That's not  
14 how it feels from our point of view, Your Honor.

15 THE COURT: Okay.

16 MR. BENJAMIN: So we would join Mr. Villa  
17 and ask for the return of the tablet. I think there  
18 are easy things that can be fashioned.

19 Thank you, Your Honor.

20 THE COURT: All right. Thank you, Mr.  
21 Benjamin.

22 MS. MORRISSEY: Your Honor, if I may -- and  
23 I will be brief -- I think one of the problems we're  
24 running into here is that we don't know what the  
25 marshal service and what the Department of

1 Corrections are concerned about. We -- this filtered  
2 down to us through the Government, who basically  
3 filed this statement of cause, and told us the  
4 tablets had been seized.

5 So, first, we need to know, you know, what  
6 are the facilities' concerns, and how can we address  
7 them? And we really can't do that.

8 The second thing is, I still don't  
9 understand why we can't get a jalopy computer and  
10 flash drives. It seems to me that that would serve  
11 the purpose of letting these individuals have  
12 information about their case. It's a tremendous  
13 amount --

14 THE COURT: Well, I'm hearing a couple of  
15 different things. One is that a request that CJA  
16 funds pay for these computers; that's one thing. And  
17 then the second one is that the facilities will allow  
18 certain laptops in. So those are two different  
19 things. And I'm skeptical that CJA is going to buy  
20 50 laptops. But if the facility is willing to  
21 allow -- I'm not sure I know what a jalopy laptop  
22 is -- but if they'll allow a laptop in, you know,  
23 that may be a solution.

24 MS. MORRISSEY: And, Your Honor, I  
25 reiterate the comments that were made that I'm

1 willing to provide my client with a laptop myself so  
2 that he can get his discovery back.

3 Thank you.

4 THE COURT: Thank you, Ms. Morrissey.

5 MS. ARELLANES: Your Honor, may I?

6 THE COURT: Yes. Ms. Arellanes.

7 MS. ARELLANES: Judge, the problem with the  
8 paper discovery is that other inmates will have  
9 access to the information and may abuse that  
10 information.

11 THE COURT: Here's what I'm hearing, is  
12 that they're showing they'll get on the laptop, and  
13 they'll say, Okay, here is SNM Document 357; they'll  
14 walk over to the cell and say, Hey, Mr. Garcia, go  
15 look at Document 357. How, from a security  
16 standpoint, is that helping anything?

17 MS. ARELLANES: Well, Judge, the problem is  
18 that some of the defendants, inmates --

19 THE COURT: Seems like we've got a very  
20 elaborate, cumbersome system in place to avoid paper.  
21 But the reality is the information is being shared  
22 among the defendants anyway.

23 MS. ARELLANES: Well -- and that may be  
24 fine. But other people that are not involved in the  
25 case will have access to the paper, such as my

1 client's cellmate. And she may very well be working  
2 for the Government. So --

3 THE COURT: Here's the problem I'm having:  
4 I mean, half the time the defendants are wanting  
5 information in the prison so they can review it. And  
6 then I've got you saying: We don't want any paper.  
7 I mean, I can't, probably, make everybody happy here.

8 MS. ARELLANES: No, Your Honor. But at the  
9 very least, the tablet is a much more secure method  
10 in which to transmit information rather than paper,  
11 because paper can float around. And that was the  
12 Government's concern to begin with.

13 THE COURT: I think they're about to give  
14 up on that concern.

15 MS. ARELLANES: Well, then they have to  
16 live with the consequences.

17 THE COURT: Which are?

18 MS. ARELLANES: Could be varied. Could be  
19 varied.

20 THE COURT: Which are? Give me one or two.

21 MS. ARELLANES: Well, you know, if the  
22 paper discovery ends up in the wrong hands, then  
23 other people can be endangered.

24 THE COURT: But the problem is, if they're  
25 just saying, Go look at page 357, it's a monumental

1 form over substance, isn't it?

2 MS. ARELLANES: Judge, the discussion among  
3 defendants is fine. But the discussion among people  
4 that are not defendants is not fine. They have --  
5 there is a privilege here that's being violated.  
6 There is an attorney-client privilege that's being  
7 violated. And so that's the concern there.

8 THE COURT: How is the attorney-client  
9 privilege being violated?

10 MS. ARELLANES: Well, because the attorney  
11 is providing information to the client. Somehow,  
12 other people that are not involved in the case are  
13 gaining access to that information by way of paper.  
14 You know, if a cellmate that's not in my client's  
15 case -- she has a cellmate that's not even related in  
16 this case, is not involved in this case -- but she  
17 would have access to that information. So that would  
18 pose a problem.

19 THE COURT: Okay. All right. Thank you,  
20 Ms. Arellanes.

21 Anyone else?

22 MR. DAVIS: Judge, I'll try to be brief.  
23 Michael Davis on behalf of Mr. Herrera. Judge, to  
24 begin with, in Otero, it's my understanding the  
25 tablets never leave the tablet room. In other words,

1 the inmates go to where the tablet is. They review  
2 the tablet for the time they're allotted, and then  
3 it's returned to the tablet room. So they don't take  
4 it to their cell with them to share.

5 The other thing that's important to note,  
6 Judge, frankly, this is the first time I've been in a  
7 case where they've done this, and I think it's been a  
8 fantastic use of the discovery, particularly in my  
9 peculiar situation, is that Mr. Herrera is housed in  
10 Otero. I don't get a chance to see him to go over  
11 the discovery nearly enough. It's of tremendous  
12 value to our case to be able to have him go through  
13 all this discovery, so when I go meet with him we  
14 have meaningful meetings, because he's had a chance  
15 to review many of the items that either I haven't  
16 gotten to or I didn't understand. So the tablet  
17 thing has really been beneficial.

18 I haven't discussed this issue with Mr.  
19 Castellano or Ms. Armijo or Mr. Beck concerning the  
20 problem that's happened with the tablets. I can tell  
21 you that Mr. Herrera, like Mr. Baca, knows nothing  
22 about what happened here. While we were talking  
23 about Wi-Fi, he leaned over and asked me what was  
24 Wi-Fi. He's very unsophisticated in the use of the  
25 tablet. He's had to learn how to use them. He's

1     been in prison for a long time.

2                 So he certainly wasn't involved in any of  
3     this, yet he's being asked to pay the price for this.  
4     We also would like the tablets back, or something  
5     like we've been using with tablets, whether it's new  
6     or different computers, or some sort of external  
7     drive to embolden the tablet some way.

8                 So that's what our position is. I  
9     understand that it's been very useful at this point.  
10    We've been very frustrated by the fact that we  
11    couldn't get the laptops back.

12                I also note, too, that when Ms. Armijo  
13    indicated this issue had arisen, I also contacted her  
14    immediately, and we had made arrangements to meet  
15    with the US Marshal Service in Otero. They couldn't  
16    do that, so we talked about doing it up here while  
17    we're in the four days of this hearing, to do the fix  
18    but I guess in the meantime, they've decided the fix  
19    isn't possible.

20                So I apologize for talking so fast,  
21    Jennifer.

22                But anyway, that's our stance on that,  
23    Judge.

24                THE COURT: All right. Thank you,  
25    Mr. Davis.



1                   Anyone else?

2                   MS. JACKS: Your Honor, I have a few  
3                   comments.

4                   THE COURT: Ms. Jacks.

5                   MS. JACKS: Just as some background  
6                   information, because the issue of the tablets was  
7                   originally addressed in front of Judge Gonzales, and  
8                   I just wanted to fill you in, I guess, on some --

9                   THE COURT: I did read the transcript.

10                  MS. JACKS: And you said that, and I had  
11                  heard that. It was the Government that suggested the  
12                  use of the tablets.

13                  THE COURT: I saw that.

14                  MS. JACKS: And it was the Government and  
15                  the New Mexico Department of Corrections that decided  
16                  what electronic devices would be provided, and  
17                  obtained those electronic devices, and then  
18                  supposedly configured them so that the discovery  
19                  would be placed on them.

20                  THE COURT: Right.

21                  MS. JACKS: So the Government was in full  
22                  control of the type of device that was inserted into  
23                  the custodial facility.

24                  THE COURT: Well, I don't disagree with  
25                  that, but I've got to move forward.

1 MS. JACKS: Right. But if they did it --  
2 and why they picked the tablets that they did, I  
3 don't know; why they picked a tablet that had Wi-Fi  
4 capability, I don't know.

5 THE COURT: I don't think anybody knew.  
6 Nobody knew that this had Wi-Fi capability. I mean,  
7 not even -- what I'm being told -- I've got to rely  
8 on what I'm being told -- not even the manufacturer  
9 knew that. So we've got to move forward.

10 MS. JACKS: Right. And I would like to  
11 move forward. And I guess what I would suggest, in  
12 following up on some comments by Mr. Benjamin, and  
13 just also in personal experience, I've worked on  
14 numerous cases where defendants were provided laptops  
15 that did not have Wi-Fi or camera capabilities. And  
16 those worked in custodial facilities in Los Angeles  
17 and many other places as well.

18 So I don't know -- I mean, I guess what I'm  
19 thinking is I would think that the Government -- the  
20 onus should be on the Government to contact whoever  
21 it is they originally contacted and find out what  
22 kind of laptop or other electronic device is  
23 available that could go into the facility. Clearly,  
24 there are. Clearly there are. And I think that  
25 would probably be a smarter way to proceed than have

1 each defendant individually come up with something  
2 that they bought at Frye's or Best Buy, or whatever.

3 THE COURT: Here's the problem is, I can't  
4 tell the Department of Corrections to go buy laptops  
5 for everybody.

6 MS. JACKS: Well, I hear that. And I think  
7 we've arranged it in Los Angeles through CJA funding.

8 But let me just go back, because I did a  
9 little back-of-the-envelope calculation. If there is  
10 50,000 pages of discovery -- and paper discovery  
11 doesn't account for the most important discovery in  
12 the case, which are recordings, and the idea of  
13 putting paper discovery back into the facilities  
14 doesn't solve the problem for the defendants, in  
15 terms of listening to the hours and hours of secretly  
16 recorded conversations done by government cooperators  
17 in the custodial facilities. But let's just start  
18 with 50,000 pages. 50,000 pages; if you assume 2500  
19 pages fit in a box, that's 20 boxes of paper  
20 discovery per defendant. And how they organize it,  
21 God only knows, or how those boxes are left, so that  
22 they have their discovery left in the manner that  
23 they've reviewed it, and doesn't get mixed up, or  
24 reviewed by other inmates, I don't know how the  
25 facilities can deal with that. Assuming a cheap rate

1 of copying at ten cents a page, that's at least  
2 \$5,000 per defendant to make the paper copies, which  
3 doesn't even begin to cover the most important  
4 discovery in the case. I mean, for \$5,000, the  
5 defendants could have Mac Airbooks, with money to  
6 spare. I think there is a way around this.

7 THE COURT: But you understand, you're  
8 working with the Government here. I mean, it doesn't  
9 always make an economical decision. It sometimes has  
10 to comply with rules. If you've got some rules and  
11 regulations in CJA that says I can pay for laptops or  
12 tablets or something, I'd be delighted to look at it.  
13 I don't know of any, sitting right here right this  
14 minute, so -- but I appreciate the economics of it.  
15 But it may be that it's not something that  
16 necessarily economics are going to prevail.

17 MS. JACKS: I just wanted to give the Court  
18 some figures for the economics of it.

19 THE COURT: I understand. I already --

20 MS. JACKS: The suggestion --

21 THE COURT: Ms. Sirignano did it last week  
22 for me. So I'm pretty familiar with the economics.

23 MS. JACKS: Just, in my experience, the way  
24 we've obtained electronic devices for defendants is  
25 by completing a CJA authorization requesting the

1 funds to purchase that, and submitting the estimated  
2 costs, and that's been approved and paid for by CJA.  
3 And I think there is a stipulation at the end that  
4 the computers go into the possession of the Federal  
5 Public Defender at the conclusion of the case, after  
6 they're wiped of discovery.

7 THE COURT: All right. Like I said, if you  
8 can educate me on what CJA can do, I'll certainly  
9 listen to that. But I'm sitting here, right this  
10 minute, I'm not familiar with that.

11 Mr. Acton?

12 MR. ACTON: Good afternoon, Your Honor.  
13 Gregory Acton on behalf of Anthony Cordova.

14 THE COURT: Mr. Acton.

15 MR. ACTON: There wouldn't be 50,000 pages  
16 of discovery if it weren't for modern technology. So  
17 I think it's only fair that modern technology be used  
18 to review that discovery. It wouldn't be there  
19 without that technology in the first place.

20 The part that I'm still unsettled about all  
21 of this -- and maybe it was gone into in more detail  
22 in Mr. Chris Garcia's hearing earlier -- but what I  
23 haven't really heard is anything from -- via proffer  
24 or what have you from, say, a computer expert of some  
25 kind saying that these tablets cannot be physically

1 disabled. Maybe I just missed that. But I remember  
2 the day when, if you had a computer, you actually had  
3 to have a card in it that would enable it to talk to  
4 an internet connection, or have any kind of cellphone  
5 connection. And I don't know if that's all been --  
6 now, it's on the motherboard, maybe it's in the CPU,  
7 whatever. But I have not yet heard anybody say  
8 authoritatively that it can't be physically disabled.

9 THE COURT: I mean, we haven't heard from  
10 the Government. But I think probably we're going to  
11 have to assume -- we're going to have to assume it  
12 doesn't matter. If the prison system is not going to  
13 allow this tablet in there, period, for whatever  
14 reason -- maybe they don't like the color of it --  
15 I've got a problem and I've got to solve it. Now, we  
16 can spend a lot of time doing history and learn  
17 everything there is to know about tablets. But we  
18 can move forward.

19 MR. ACTON: Well, at this point, Your  
20 Honor, if we were able to determine that there was an  
21 alternative, I guess what I would ask is the Court is  
22 not going to enter an order, or anything at this  
23 point, that would be inconsistent with us being able  
24 to address this at a point where we are able to  
25 discover that, yes, these tablets could be disabled,

1 or something similar to, you know, the way the  
2 tablets were provided in the first place -- I'm  
3 hearing that the tablets may be reaching their limit  
4 anyway, and there needs to be some kind of  
5 replacement. But I would hope that the Court would  
6 leave open that possibility that whatever the form  
7 the Court order, or decision is going to take, that  
8 it would allow us to continue with that, if we can  
9 find, talking to an computer expert, that there is  
10 some way to physically disable either the tablet  
11 they've got, or something of equal or comparable  
12 expense, something that you could confirm that this  
13 is not just a software hack, but that it's physically  
14 disabled, and that's easily confirmed, that it  
15 doesn't have the physical capabilities.

16 So I just wanted to make sure that was  
17 considered by the Court.

18 THE COURT: All right. Thank you,  
19 Mr. Acton.

20 Anybody else? Mr. Lowry?

21 MR. LOWRY: Your Honor, just briefly. Your  
22 Honor, I heard the Court -- and pardon me for  
23 characterizing this as frustration over this issue,  
24 but --

25 THE COURT: I'll try to sound less

1 frustrated.

2 MR. LOWRY: But we're equally frustrated,  
3 Your Honor.

4 You had asked why haven't we been working  
5 on a solution before this. And frankly, I just  
6 wanted to bring it to the Court's attention, we were  
7 under the impression, based on the email from the  
8 Government that, after the inspection, at least the  
9 tablets would have the opportunity to move back to  
10 our clients. That was -- I think, whether that was  
11 the intended idea --

12 THE COURT: I haven't gotten that  
13 impression from the Government.

14 MR. LOWRY: What I'm suggesting, Your  
15 Honor, is we didn't -- the royal "we," collective  
16 "we" of the defense team didn't have the  
17 understanding that these tablets were never going to  
18 be returned until late Friday. And we haven't really  
19 had the opportunity to work with our colleagues on  
20 the other side of this or the marshal service or our  
21 individual institutions to really develop a solution,  
22 Your Honor. I would like the opportunity to do that,  
23 in a way that meets everyone's needs. I just wanted  
24 to bring that to your attention.

25 THE COURT: Okay. Thank you, Mr. Lowry.



1           Anyone else from the defendants?

2           All right. Ms. Armijo, let me ask you a  
3       few questions. Let me make sure I understand,  
4       because I've been up here saying it's not your table;  
5       that this is being driven by the Marshal Service and  
6       by the corrections facilities. Am I correct, or is  
7       this something that Mr. Acee or somebody else has  
8       decided -- at your table has decided these tablets  
9       should be taken from the defendants?

10           MS. ARMIJO: We did not make the decision  
11       to take the tablets from the defendants. We have an  
12       email that we referred to last week in the hearing,  
13       that when the issue came up -- and obviously, it's  
14       not surprising that cooperators would tell us this,  
15       because they're cooperating with the Government. We  
16       could have some of these defendants who are more  
17       computer savvy that have figured this out, but  
18       they're not going to be telling the Government this.

19           And I really take issue with what Mr.  
20       Benjamin said, and blaming Mr. Acee, and in creating  
21       it, and saying that we are creating this issue.

22           THE COURT: Well, let me clear the air,  
23       though. Did Mr. Acee have any decision-making over  
24       the tablets being removed?

25           MS. ARMIJO: No. The tablets were removed.

1 What happened was that we were told by CHSs that this  
2 was possible. We really didn't believe it to be  
3 possible. And at two separate times, to prove their  
4 point, CHSs emailed Special Agent Acee when he was  
5 not at the facility. So there was absolutely no way  
6 that he could have provided the hot spot, the Wi-Fi  
7 for this to happen, to come up with some grand scheme  
8 for defendants to take their tablets back and to pull  
9 it.

10 THE COURT: So who made the decision to  
11 pull the tablets?

12 MS. ARMIJO: The decision to pull the  
13 tablets was made by the US Marshal Service. We  
14 informed the US Marshal Service -- I can tell you it  
15 was during the week -- and I have the email -- it was  
16 during the week of April 17. Mr. Beck and I were in  
17 trial in Las Cruces. Mr. Castellano was handling  
18 this issue. And we informed the US Marshal's Office  
19 that the tablets had internet capability with certain  
20 maneuvers that were done. The US Marshal's Office  
21 expressed concern about that, and indicated that they  
22 wanted to pull it -- all the tablets. Mr. Castellano  
23 emailed them back and said, We need to make certain  
24 that we do this in accordance with the protective  
25 order. Here is the protective order.

1           Regardless of that the US Marshals, for  
2       safety concerns obviously, and other concerns, pulled  
3       all their tablets. We did tell them there was a  
4       protective order. We did email them the protective  
5       order. But they made the decision to pull all of the  
6       tablets. And I don't think it takes rocket science  
7       to figure out why the tablets were pulled. If  
8       somebody has in their possession, even if they didn't  
9       figure it out, clearly, by today, they will figure it  
10      out; they'll have access to things that they  
11      shouldn't: Communications to the outside,  
12      pornographic material, things that are not allowed.

13           And the idea that, well, we didn't do any  
14      harm, and they can come and check -- so we checked  
15      the tablet on a Tuesday; they then make the necessary  
16      arrangements -- and let's just say we have tablet  
17      checks every Wednesday. They could very easily  
18      between that break the code, do what needs to be  
19      done -- I don't want be specific about it here in  
20      open court -- do what needs be done, and have a whole  
21      week, even if it's just -- and all it takes is just  
22      one email.

23           THE COURT: But aren't they going to  
24      destroy all the evidence on the computer?

25           MS. ARMIJO: They would. They would

1 destroy all the evidence. But our concern is not  
2 them destroying the evidence. Our concern -- well,  
3 the US Marshal's concern is them having things that  
4 would be considered contraband.

5 THE COURT: I understand that.

6 I need to give Ms. Bean a break, and we all  
7 need to get fed. Let me suggest this: During the  
8 break -- and you need to eat, too, so I'm not trying  
9 to shorten your lunch -- talk to the marshals. We've  
10 sat here and listened this morning to the fact  
11 that -- as far as I can tell, none of the people that  
12 are in this room are the ones that maybe did what  
13 we're concerned about. If the defendants knew that  
14 they were going to lose all their discovery, and  
15 everybody is going to quickly know that they're the  
16 person that is doing this, and so then we're dealing  
17 with maybe just a handful, if any, of the defendants,  
18 could the marshals live with that? I mean, anything  
19 we put in place is going to have some risks. But if  
20 we could get the tablets back in their hands,  
21 understanding that we're going to check them, and if  
22 they do it, they're going to lose it, and then we're  
23 going to have to figure out what that person is going  
24 to do. Check and see if the marshals could live with  
25 something along those lines of getting the tablets

1 back in their hands. Don't answer now. I'd like for  
2 you to talk to the marshals, and see if they could  
3 live with that.

4 Deputy US Marshal Royce Namoca is present  
5 in the back. So you can talk to him. And give me an  
6 answer after lunch. It seems to me I can reduce a  
7 lot of problems by just getting these tablets back  
8 in, buying us some time. And then, if there is a  
9 long-term solution, I'm welcome to hear it. But I'm  
10 interested in a Band-Aid here for a short period of  
11 time, to see if we can put in a long-term solution.

12 All right. We'll be in recess for an hour.  
13 Nobody is going to start without you, so finish your  
14 sandwiches. See you in about an hour.

15 (The Court stood in recess.)

16 THE COURT: All right. We'll go back on  
17 the record. Looks like we've got everybody here.

18 Ms. Bean told me that some folks were warm  
19 back there. I know it was a little warm this  
20 morning. If you want to take off your jackets --  
21 this probably applies to the lawyers -- you can take  
22 off your jackets and things. So don't feel like you  
23 have to stay in those.

24 All right. Ms. Armijo, you were arguing on  
25 the tablets. And you were going to also give me some

1 information.

2 MS. ARMIJO: Yes, Your Honor. Over the  
3 lunch hour, I conferred with the US Marshals.

4 THE COURT: Hold on, Ms. Wild is reminding  
5 me I need to -- Mr. Kochersberger -- I think I'll do  
6 it blanket -- but Mr. Kochersberger, you're here now,  
7 so you want to enter your appearance?

8 MR. KOCHERSBERGER: Don Kochersberger on  
9 behalf of Sergio Rodriguez.

10 THE COURT: All right. Mr. Kochersberger,  
11 good afternoon to you.

12 Are there any new attorneys present other  
13 than Mr. Kochersberger?

14 All right. Mr. Baker, I think you wanted  
15 to leave after we got through with this tablet issue.

16 MR. BAKER: That's correct, Your Honor.

17 THE COURT: I'll leave it to you. I mean,  
18 you know how these hearings are. Issues come up that  
19 might impact you or your client. I can't think of  
20 anything that is going to come up. But you know how  
21 they are kind of a rolling thing, people start  
22 raising stuff. So I leave it to you as to whether  
23 you think that any of the items that are set -- so  
24 I'll just leave it to you. I'd love to have you  
25 stay.

1 MR. BAKER: Thank you, Your Honor. My  
2 understanding is that the rest of the week, there  
3 will not be items that pertain to my client.

4 THE COURT: Yeah, I talked to Ms. Wild  
5 about it, and I'm not sure I see it either. But  
6 you're welcome to stay. I'll pay for it. Or you can  
7 leave, and I think probably you're in good shape.

8 MR. BAKER: I'm concerned about my client  
9 being transported. I don't believe there is any need  
10 to transport him for the next few days.

11 THE COURT: He won't be. Thank you, Mr.  
12 Baker.

13 Ms. Armijo.

14 MS. ARMIJO: Your Honor, over the lunch  
15 hour I conferred with the US Marshal Service, and  
16 given that the tablets cannot be fixed, they will not  
17 allow the tablets to go back into the facilities.

18 THE COURT: Let me ask you this -- I hate  
19 to put it in such blunt terms, but if I order the  
20 marshals to return the tablets immediately, will they  
21 comply?

22 MS. ARMIJO: Well, I think that they -- and  
23 maybe we should hear from them as to the concerns,  
24 Your Honor. Because there is concerns with -- as  
25 they put it, as a law enforcement officer, you have a

1 device in which somebody could plan their escape,  
2 they could send out a hit. It's safety, not just of  
3 other inmates, but of the Court, of other people.  
4 There is a lot of issues for the tablets.

5 But they're not opposed to the, quote,  
6 "jalopy laptop," if the defense wants to provide  
7 that, as long as Corrections Department IT person  
8 indicates that, in fact, they cannot have internet.  
9 And the problem with the tablets is the Microsoft  
10 operating system that's on it. And the tablets are  
11 actually very nice, as opposed to a simple laptop.  
12 They were very expensive.

13 And I just wanted to put on the record,  
14 Your Honor, I know you are aware of the reasons why  
15 we got the tablets. But many of the counsel here  
16 were not present for that hearing. And the United  
17 States agreed to it. The United States initially was  
18 opposed to paper going back in. And Judge Gonzales  
19 was concerned about defendants not having discovery.  
20 And we did this as a safety concern, for witnesses'  
21 protection, for CHS statements. And so it was a  
22 compromise, but Corrections Department agreed to pay  
23 for the tablets because of the safety concerns.

24 Well, those safety concerns are gone. As  
25 you heard before, last week, gang members have



1 adapted to the use of the tablets. And so the whole  
2 reason for having the tablets is gone, and now they  
3 are a huge security risk to have in there. The  
4 United States is not opposed to having paper go back.  
5 I keep hearing 50,000. But I'm certain we're not at  
6 50,000 pages.

7 So my understanding is that the facilities  
8 will allow them to take back paper. I had also  
9 talked about the facilities having one computer  
10 maybe, with just a simple hard drive that could be  
11 used. But all the reasons that I'm hearing that they  
12 need it -- for instance, they're saying, you know,  
13 it's an issue about money. Well, my understanding  
14 is, for these tablets to be updated -- and this was  
15 coming from Mr. Aoki -- when these tablets were being  
16 updated, it was very costly each time they were sent  
17 out, just the postage alone. And so I think that as  
18 far as monetary costs, it isn't an issue as far as  
19 having paper go back in be the issue.

20 I know people were saying that Torrance --  
21 Mr. Villa was talking about having a hot spot, and  
22 that they're secure lines. Unfortunately, these days  
23 there are correction officers, and other people who  
24 are employed at correction facilities who can be  
25 compromised, who could give out the password. You

1 could have someone, as the Court pointed out, in the  
2 parking lot at a certain time with a hot spot. So  
3 there is just really no safe way to have these  
4 tablets work to ensure that they cannot get Wi-Fi at  
5 this point.

6 And, Your Honor, I do again take issue with  
7 Mr. Benjamin's statements as to Special Agent Acee.  
8 And as an officer of the court, he should have a good  
9 faith basis for making such bold accusations that  
10 Special Agent Acee provided a hot spot, and basically  
11 cooked this whole thing up. So I would like to know  
12 what the good faith basis was for that statement.

13 So, Your Honor, we are willing to go back  
14 to the old-fashioned method, the paper method. The  
15 Court can explore having computers that don't have  
16 Wi-Fi for general use among the defendants. Or if  
17 the Court is inclined to, but obviously New Mexico  
18 Corrections will assist in making it safe, but will  
19 not be providing a computer for the inmates to use  
20 anymore, since the whole safety reason is out the  
21 window.

22 THE COURT: Well, I guess I'm -- I mean, I  
23 guess I'm concerned that we can't point to anybody in  
24 this room that did anything wrong.

25 MS. ARMIJO: Well, we can't, because we

1 haven't examined them all. And the reason we haven't  
2 examined them all is because I sent out an email. I  
3 did have requests from a few attorneys, and there  
4 were a few examinations. But then I started getting  
5 emails from people saying, Well, we will only agree  
6 to it if there is anything on it, and you can't use  
7 it in the future, and you can't look at it. They  
8 started putting all these limitations on it. And I'm  
9 afraid that would also happen in the future, where,  
10 if there is a set time -- and maybe we should let the  
11 US Marshal's Office speak as to that, because now  
12 this is -- obviously, all these inmates know that  
13 this can be done. And so even, if it isn't -- and  
14 I'm not saying that it is, I'm saying we don't know  
15 that these people -- because the tablets have not  
16 been looked at. Only a few have.

17 But I think the Court should consider the  
18 US Marshal Service's concerns about this and  
19 Corrections' concerns.

20 THE COURT: Well, put on your agent, and  
21 let me hear it. Because I guess I'm beginning to be  
22 concerned about how much of a problem this is. But  
23 it's creating a big problem. It's creating a  
24 representation of effective representation here. So  
25 I'm beginning to think that we're creating a problem

1       rather than solving a problem. So if you want to  
2       call your witness, put him on the stand to testify.

3               MS. SIRIGNANO: Your Honor, during the  
4       break, a number of defense attorneys also spoke to  
5       Mr. Namoca, if you want to hear what the defense is  
6       willing to proffer, or would you rather him just take  
7       the stand?

8               THE COURT: Let's just let Ms. Armijo put  
9       him on the stand.

10              MS. SIRIGNANO: Thank you, Your Honor.

11              THE COURT: Ms. Armijo. Mr. Namoca, if  
12       you'll raise your right hand, before you're seated,  
13       Ms. Wild will swear you in.

14              THE CLERK: Please be with seated. State  
15       your full name for the record.

16              THE WITNESS: Royce Namoca.

17              THE COURT: Mr. Namoca, Ms. Armijo.

18              MS. ARMIJO: Thank you, Your Honor.

19                              ROYCE NAMOCA,  
20       after having been first duly sworn under oath,  
21       was questioned and testified as follows:

22                              DIRECT EXAMINATION

23       BY MS. ARMIJO:

24              Q. Mr. Namoca, how are you employed?

25              A. I am a Supervisor Deputy US Marshal with

1 the US Marshal Service.

2 Q. And is it fair to say that you are kind of  
3 the point person with the US Marshal Service in  
4 reference to these cases?

5 A. Overall prisoner protection, yes, ma'am.

6 Q. Now -- and were you made aware of a  
7 situation regarding the tablets and possible internet  
8 capabilities?

9 A. Yes.

10 Q. And after you were made aware of that, what  
11 decision did you make?

12 A. I pulled the tablets.

13 Q. And why did you pull the tablets?

14 A. I mean, our policies are pretty specific.  
15 Any contraband -- I won't say contraband, but device  
16 that can be used to aid in escape or commit an  
17 assault cannot be given to a pretrial inmate. It's  
18 broad, but it's specific.

19 Q. All right. And so what are your concerns  
20 with a tablet that could have internet access as far  
21 as -- you mentioned escape and assaults?

22 A. Yes, ma'am.

23 Q. And how -- what sort of things would you  
24 envision?

25 A. I mean, it's as simple as just overwriting

1 the tablet, creating an internet source, if you have  
2 a Wi-Fi source of some sort, and just communicating  
3 with the public. I mean, it's just that simple.

4 Q. And are those concerns heightened in a case  
5 such as this?

6 A. I agree, yes.

7 Q. Are they?

8 A. Yes, they are.

9 Q. And how so?

10 A. It's a large conspiracy. Let's call it  
11 what it is. Some of the defendant have large  
12 criminal histories. And that's just information we  
13 receive from the prosecution team, and what we know  
14 from NMCD.

15 Q. And is your office willing to work with --  
16 if the defense provides some sort of electronic  
17 device that does not have capabilities for internet,  
18 are you willing to allow those into the facility for  
19 the defendants to use?

20 A. Of course. All of our contract facilities  
21 already have that in place.

22 Q. So there are other mechanisms for them to  
23 review discovery other than having paper?

24 A. Yes, ma'am.

25 MS. ARMIJO: I have no further questions.

1 THE COURT: All right. Thank you, Ms.  
2 Armijo.

3 We probably don't need everybody  
4 questioning. But Ms. Sirignano, do you want to ask  
5 any questions and elicit the testimony that you  
6 wanted to proffer?

7 MS. SIRIGNANO: May it please the Court?

8 THE COURT: Ms. Sirignano.

9 CROSS-EXAMINATION

10 BY MS. SIRIGNANO:

11 Q. Deputy Namoca, did you speak with defense  
12 counsel during the recess here at lunch about the  
13 tablets and the laptops possibly going into the  
14 facilities?

15 A. Yes.

16 Q. And that was approximately four of us: me,  
17 Mr. Benjamin, Mr. Esquibel, and Mr. Lowry; correct?

18 A. Correct.

19 Q. Okay. And so, when asked about the actual  
20 tablets and whether the Court could order the United  
21 States Marshal Service to allow those tablets that  
22 were provided by the Government back in the  
23 facilities, what did you advise us?

24 A. We would note our objection to it, because  
25 of the security risks. Basically, it's my job. But

1 I would have to seek other counsel as well. But if a  
2 court order was written, I don't know, I would have  
3 to go ask my management, to be honest.

4 Q. So if the Judge were to order you, the  
5 Marshal Service, to put those tablets back in the  
6 facilities, you would seek counsel from the Marshal  
7 Service? But of course, the Marshal Service would  
8 obey an order from this Court?

9 A. Based on my experience, more than likely,  
10 yes.

11 Q. More than likely, yes?

12 A. Based on my experience, yes.

13 Q. Okay. And if that was a solution for the  
14 short term, you would allow defense counsel to bring  
15 laptops in once they were reviewed and approved by  
16 the New Mexico Department of Corrections' IT unit?

17 A. I'll have to seek counsel from my  
18 management, to include our headquarters components.  
19 But it could be -- if it's written in the court  
20 order, I would seek to what to do basically.

21 Q. Regarding the tablets that were currently  
22 removed?

23 A. Yes. Or to include additional IT equipment  
24 that could be introduced to the jail.

25 MS. SIRIGNANO: Thank you. No further



1 questions.

2 THE COURT: Thank you, Ms. Sirignano.

3 Ms. Johnson.

4 MS. JOHNSON: May I, Your Honor?

5 THE COURT: You may.

6 CROSS-EXAMINATION

7 BY MS. JOHNSON:

8 Q. Good afternoon, Deputy Marshal Namoca.

9 Now, when were you notified by the  
10 Government? Or who were you notified by? The FBI?

11 A. I don't know if it's either the FBI or the  
12 prosecution team.

13 Q. And what were you told?

14 A. I cannot recall exactly, other than the  
15 fact that a CHS was able to compromise a tablet.

16 Q. And this informant was housed at Sandoval  
17 County Detention Center, right?

18 A. Yes.

19 Q. And none of these other defendants in the  
20 courtroom today are housed at Sandoval County  
21 Detention Center; correct?

22 A. Correct.

23 Q. And what you were told is that an informant  
24 accessed the Internet on his tablet?

25 A. Correct.

1 Q. And then your testimony on direct  
2 examination was that you made the decision to pull  
3 the tablets of all these other defendants, right?

4 A. Correct.

5 Q. But your decision was made after you  
6 consulted with the prosecutors, right?

7 A. Correct.

8 Q. And, in fact, they suggested to you that  
9 you pull the tablets?

10 A. No, they didn't suggest it.

11 Q. But they discussed it?

12 A. They offered information that would lead me  
13 to pull the tablets, yes.

14 Q. And it wasn't just your decision entirely;  
15 that was made after you consulted with the  
16 prosecutors, right?

17 A. Correct.

18 Q. And you didn't consult with any of the  
19 other defense attorneys in this room?

20 A. I did not.

21 Q. And, in fact, you didn't notify any defense  
22 attorneys in this room that you were planning to pull  
23 the tablets?

24 A. I did not.

25 Q. You have no evidence that any of these

1 defendants in this room accessed the internet on  
2 their tablets?

3 A. None.

4 Q. And you have no evidence that an internet  
5 connection could be established at Torrance County  
6 Detention Center?

7 A. I didn't check.

8 Q. Otero County Detention Center?

9 A. Nope.

10 Q. Santa Fe County Detention Center?

11 A. Nope.

12 Q. And, in fact, your decision, or what you're  
13 telling the Court about these security concerns is  
14 just an overall concern, but not specific to each one  
15 of these defendants?

16 A. Yes.

17 Q. It is specific?

18 A. No. It's an overall concern.

19 Q. But not specific to each one of these  
20 defendants?

21 A. Not specific, no.

22 Q. So if these tablets, for each one of these  
23 defendants in this room were checked, and you made  
24 sure that at each one of these facilities where these  
25 defendants are being housed there is no internet

1 access, would you feel comfortable returning those  
2 tablets?

3 A. Once I seek counsel from other parties in  
4 my agency, I will be open to it, yes, ma'am.

5 MS. JOHNSON: I have no further questions.  
6 Thank you.

7 THE COURT: Thank you, Ms. Johnson.  
8 Maybe one more. Mr. Villa.

9 CROSS-EXAMINATION

10 BY MR. VILLA:

11 Q. Good afternoon, Deputy. If there were a  
12 mechanism in place so that you could check the tablet  
13 or a corrections officer at the various facilities  
14 could check the tablet to determine if it had been  
15 bypassed, would that make you more comfortable with  
16 having the tablets in the facilities?

17 A. The current tablets?

18 Q. Yes.

19 A. It wouldn't make me more comfortable, no,  
20 sir.

21 Q. Well, the tablets, as I understand it, if  
22 they're bypassed, can then access a hot spot or Wi-Fi  
23 connection; correct?

24 A. Yes.

25 Q. If they're not bypassed, they cannot?

1 A. Yes.

2 Q. That's your understanding, too?

3 A. Yes.

4 Q. So if there were a mechanism in place that  
5 this Court could order to help us determine if a  
6 tablet had been bypassed, and to allow the facilities  
7 to look at a tablet under certain conditions to see  
8 if it had been bypassed, would that not help allay  
9 some of your security concerns?

10 A. It would help. But like I said to Ms.  
11 Sirignano and Ms. Johnson, I would have to seek other  
12 things, too. I would have to talk to other  
13 counterparts in my agency.

14 Q. Sure. You have devices, do you not, to  
15 determine if a particular facility has Wi-Fi?

16 A. My own equipment, sure.

17 Q. You could get on your phone right here and  
18 check and see what the Wi-Fi networks are, right?

19 A. Yes, of course.

20 Q. And the folks at the facilities, could do  
21 that, too?

22 A. They could.

23 Q. And if their security measures in doing  
24 that right now weren't adequate, you could help them,  
25 make them better able to detect these Wi-Fi networks?

1           A.    I don't know off the top of my head, but  
2   I'll have to talk to some of other partners that are  
3   more familiar with that type of thing.

4           MR. VILLA:   That's all I have.

5           THE COURT:   Thank you, Mr. Villa.

6           All right.   Ms. Armijo, anything else you  
7   want from Mr. Namoca?

8                       REDIRECT EXAMINATION

9   BY MR. ARMIJO:

10          Q.   Do you have a way of preventing, at either  
11   Torrance or Otero or any of the other facilities that  
12   were listed just now, from having someone park  
13   outside with a hot spot, which would then give people  
14   inside ability to connect to the Wi-Fi?

15          A.   To my knowledge, no.

16          Q.   And are you able to prevent corrections  
17   officers from being compromised in bringing in either  
18   a hot spot phone, or in providing the password of a  
19   secure facility?

20          A.   No.

21          Q.   Are there ways for people who are in those  
22   facilities being -- specifically, let's just talk  
23   about Torrance and Otero County -- are there ways for  
24   people then -- now, specifically -- using either hot  
25   spots from other people to get internet access?

1 MS. JACKS: Objection, calls for  
2 speculation.

3 THE COURT: Well, we're predicting the  
4 future. So there is a certain amount of speculation.  
5 I need to hear it. Overruled.

6 A. Would you repeat the question, ma'am?  
7 Sorry about that.

8 Q. I said is there a way for people in those  
9 facilities, then, to get access -- people being  
10 inmates -- to get access to Wi-Fi?

11 A. There is.

12 Q. And does that cause concern for you?

13 A. Of course. That's my job.

14 Q. And also, even with -- I'm going to give  
15 you an example -- if you had weekly checks of  
16 tablets, does that still cause you concern, given  
17 that at any point a tablet could be compromised?

18 A. Yes.

19 Q. And explain that to the Court.

20 A. Well, I mean, there are gaps in periods of  
21 times when the tablet is not checked. It just takes  
22 one instance to compromise the tablet, and you have  
23 access. It's as simple as that.

24 Q. And would that -- even if -- let's just,  
25 hypothetically speaking, if somebody in Torrance

1 County compromised theirs in Otero County, could they  
2 then communicate with each other?

3 A. That's a possibility, from what I know.

4 MS. ARMIJO: I have no further questions.

5 THE COURT: I thank you, Ms. Armijo.

6 Mr. Namoca, thank you. I appreciate your  
7 testimony. You may step down.

8 All right. Do you have any further  
9 argument, Ms. Armijo?

10 MS. ARMIJO: No, not unless the Court  
11 has -- no, I just wanted to be able to give the US  
12 Marshal's side of it, and the security concerns.

13 THE COURT: All right. Thank you, Ms.  
14 Armijo.

15 Anyone else on the defendants? I'll give  
16 you the last word on the motion, Mr. Villa.

17 Mr. Esquibel?

18 MR. ESQUIBEL: Thank you, Your Honor. Your  
19 Honor, the problem that we have here is that, again,  
20 we have a protection order that we set out, and we  
21 have actually a system that was set up for checks and  
22 balances. The system -- in order to get access to  
23 the wireless system, the individual, as has been  
24 talked about, has to wipe their system clean.

25 Okay. Your Honor, I received a degree in



1 management information systems, was a computer  
2 programmer for three years. I've worked at several  
3 companies. And the things that they're talking about  
4 doing are a little bit sophisticated. I think 60  
5 percent of the attorneys here have said, "I don't  
6 even know how to do that." And we have to remember  
7 that there is a good portion of our clients who have  
8 been in custody for so long that this is their first  
9 experience with a computer. So we're having to have  
10 all these moons aligned in order to have this done.

11 Now, there is no 100 percent perfect system  
12 for anything. And I don't think anyone is ever going  
13 to disagree. But what we have is a system where, if  
14 they're diligently checked once a day, twice a day,  
15 to look, it's not like the person can wipe their  
16 computer, get on the internet, then get all their  
17 discovery back. The second that they wipe their  
18 system and set it back to factory default, everything  
19 is lost. And it's very easy to check. And it  
20 doesn't require an invasive procedure or anything big  
21 to be done.

22 None of us have had the opportunity to talk  
23 to New Mexico Corrections IT department, but I find  
24 it completely dumbfounding that a company would  
25 create a piece of hardware, like a motherboard, that

1 would have a wireless card integrated in it, so that  
2 it was part of a motherboard. That's an object that  
3 you create, because they fall apart, to be able to  
4 pop in and pop out. I was sent the specs for this  
5 machine from Russ Aoki's office. It clearly showed  
6 that there was an addition of a wireless card there.

7 If we can't get that done, the problem that  
8 we have is we have a July date that's moving quickly,  
9 a lot faster than several of these co-defendants  
10 would like, and they have no access to discovery.  
11 The tablets, again, might be an imperfect solution.  
12 But it's a solution that balances the needs of our  
13 clients, and in this case we need to not forget about  
14 that.

15 I very seriously doubt that if that goes  
16 away, that they're going to be provided with paper  
17 discovery within 24, 48 hours.

18 And the thought that they're going to put  
19 one machine in each facility for anywhere from four  
20 to more people to have to share, I don't believe that  
21 they're going to let them review the discovery in a  
22 group. That means that everybody is going to be  
23 limited. So we're, therefore, limiting their  
24 discovery.

25 As far as the amount of paperwork, I don't

1 doubt that there is less than actual 50,000 unique  
2 pages. But the problem is that it has been --  
3 they've been duplicated in different cases, and we  
4 don't know which is the same document in all of them.  
5 And we'll never know.

6 Your Honor, the clients need these tablets.  
7 They're their lifelines. And I don't think that  
8 there is going to be anyone here who is going to  
9 sacrifice having access to their discovery to get on  
10 Facebook and update their status, or email people, or  
11 plot and scheme to get something done. And if they  
12 are going to plot and scheme, it's going to take  
13 quite a bit of work to have somebody drive to the  
14 facility, set up a hot spot. Things like that can be  
15 detected. Anybody can pull up their phone and look  
16 at what are the wireless signals around, and what can  
17 be jumped on. These guys are going to have to  
18 coordinate with other facilities to be on at the  
19 exact same time. And quite frankly, it's not simple  
20 to get some of this stuff done, and it's especially  
21 not simple for users who are not sophisticated.

22 We'd like the opportunity to check with  
23 Corrections, and see if there is a workaround. I  
24 don't know if Corrections now is saying that they're  
25 just going to take their tablets and go home. If

1 that's the case, then our clients don't have  
2 discovery. It's going to take us, even best case  
3 scenario, 30 days to get a machine put together, a  
4 very basic machine put together, to get back in our  
5 clients' hands. But the reason why the technology  
6 for them is so important is that there is so much  
7 discovery that having the technology allows them to  
8 do searching, basic searching, so that they can go in  
9 and type in their own name and get all the pieces of  
10 paper that come up with their name, just as a  
11 starting point. And then they can go back and forth.

12 All of these facilities are going to limit  
13 the amount of paperwork. They're not going to be  
14 easily able to go between different discovery and  
15 different things.

16 And as also has been stated, we also need a  
17 way for them to watch the videos and listen to the  
18 phone calls. A lot of the CI materials that we have  
19 are from the contraband cellphone and wiretaps that  
20 have gone there.

21 Your Honor, we would just ask that, as the  
22 US Marshals have stated that the Court does have the  
23 ability in this case to ask that they be given back.

24 And I think that this is much like the  
25 sheet that covered Mr. Baca early on, I think that

1     there is a level of maturity and ability to act right  
2     that we can have, especially since all of this comes  
3     from people that are working with the Government who  
4     do these acts and are ruining everything.

5             THE COURT: All right. Thank you, Mr.  
6     Esquibel.

7             Anyone else want to say anything? Ms.  
8     Johnson.

9             MS. JOHNSON: Your Honor, I just wanted to  
10    clarify a point that was raised during the redirect  
11    of Mr. Namoca. Your Honor, each one of these  
12    facilities -- something that was not raised in my  
13    cross because I didn't anticipate that coming up in  
14    my redirect -- but every one of these facilities has  
15    a patrol unit that patrols the parking lot. So if a  
16    car is parked -- and I don't know if the gentleman  
17    from Torrance County has left -- but if a car is  
18    parked in the parking lot for a period of time, and  
19    the person is not an attorney, or the person is not  
20    leaving, they are approached and asked to leave the  
21    grounds. So someone can't just go park outside, park  
22    outside a facility, and establish a hot spot. They  
23    will promptly be spotted and asked to leave. So that  
24    is an issue that I wanted to make sure the Court is  
25    aware of, that this is not just something that can

1       happen.

2                   THE COURT: All right. Thank you, Ms.  
3       Johnson.

4                   Anyone else?

5                   MR. LOWRY: Your Honor, just briefly.

6                   THE COURT: Mr. Lowry.

7                   MR. LOWRY: When Ms. Armijo first sent the  
8       email inviting us to go inspect the tablets, like I  
9       said earlier, we immediately took her up on that, but  
10      we've never had the opportunity.

11                  As part of that email, we asked that any  
12      tablet that was known to be compromised be preserved  
13      for evidence in this matter. And I just wanted to  
14      put that on the record, Your Honor, that all the  
15      compromised tablets that we know of, that are in the  
16      possession of confidential human sources of  
17      information in the Government's employ, be preserved  
18      so we can -- at some point in the future, you have a  
19      motion to compel access to electronic devices by Mr.  
20      Baca's team. And we'd like to get access to those  
21      devices as well, so we could see precisely how these  
22      confidential sources used, and perhaps abused, the  
23      devices in terms -- to get contraband. The  
24      Government made the comment that they could download  
25      pornography, or what have you, from the internet.

1 I stand firm in my offer to have Mr. Baca's  
2 tablet inspected and returned. We're confident that  
3 there has been no misuse. We'd like to get that back  
4 to him. But our concern is that the Government  
5 informants were the ones misusing and abusing and  
6 downloading contraband. And the defense teams are  
7 entitled to know that, Your Honor. So we'd ask that  
8 they be preserved.

9 THE COURT: All right. Thank you, Mr.  
10 Lowry.

11 Anyone else?

12 MR. BENJAMIN: Your Honor, I just want to  
13 simply state that my representations on the record  
14 are by the reading of the statement of cause,  
15 Document 1107. That's where I obtained my belief.

16 THE COURT: All right. Thank you, Mr.  
17 Benjamin.

18 All right. Anyone else?

19 Well, the marshals are just doing their  
20 job. And I think we can all thank the marshals for  
21 their hard work in this case. They have worked  
22 extremely hard, and tried to keep everybody safe in  
23 the prisons, in travel, here in the courtroom. So I  
24 think we owe a lot of appreciation for the way that  
25 they've worked hard to try to balance a lot of

1 things.

2 I do think under my opinion in Folse, which  
3 I issued in response to a motion that Mr. Vigil  
4 filed, this is an area in which I do think I retain  
5 jurisdiction and the power, because it goes to the  
6 interference of effective assistance of counsel. I  
7 think I have the power and the duty to ensure that  
8 counsel are effectively representing their clients.

9 I think we've worked hard on the protective  
10 order. We've worked on these tablets. We've worked  
11 hard to create a system that works. And I'm  
12 reluctant to crater the system unless I feel that  
13 it's necessary. I think this may be an ongoing  
14 discussion. I know it's going to be an ongoing  
15 discussion because of what I'm going to say. But I  
16 am going to grant the motion for the immediate return  
17 of the tablets. I don't think I have anything in the  
18 short term that is going to fill it in. So the  
19 tablets will be returned immediately.

20 What I'll also order is that within three  
21 days, which will basically be by the end of the week,  
22 I need to have in my hand what modifications to the  
23 protective order we need to put in place to reduce  
24 the anxiety of the marshals to these tablets being in  
25 the facility. If there is some daily check, some



1 more frequent check, something that can be done to  
2 reduce their concern, I'm probably game for it. So I  
3 think defendants, as you get the request from the  
4 Government, be mindful that I'm going to probably,  
5 given that I'm putting the tablets back in the  
6 defendants' hands, I'm going to be receptive to the  
7 Government having some ability to check these things  
8 to make sure that there is nothing going on.

9 So I'll give them three days to do it. If  
10 you want to respond to what they have, but I want to  
11 put in some protocols. So be charitable to the  
12 Government when you get their list of things, that  
13 they're working with the marshals to try to reduce  
14 anywhere anxiety about them going in.

15 Long-term, I'm receptive to something more  
16 than -- you know, something different. If we want to  
17 go the laptop route, that's fine. I can check with  
18 CJA and see if I can do more, I'm fine there. If we  
19 want to go a different direction, I'm receptive to  
20 that. But I think I've got to get something in place  
21 immediately to keep this case on-track, keep the  
22 defendants being represented effectively, and ensure  
23 that, you know, that we're giving the defendants  
24 access to the materials they need.

25 I don't need a gap in this. And so I think

1 about the only way to prevent the gap is to get the  
2 tablets back in their hands.

3 To the defendants themselves -- and I would  
4 ask every counsel to talk to their defendant about  
5 it -- help us out, guys. I mean, you know, you've  
6 sat here and listened to a lot of stuff. And it may  
7 have made you interested in doing something. Don't  
8 do it. Because if you didn't catch everything,  
9 you're going to lose all your data. I mean, you're  
10 going to be caught promptly. So you're going to lose  
11 all your data, and we're going to know who loses it.  
12 And so work with us. We're trying to get you the  
13 documents in your hands. So don't use these things  
14 for anything else. Just use them for looking at the  
15 documents that are on there. Because if you're not,  
16 it's going to be a rather stupid thing, because  
17 you're going to lose all your data, and my sympathy  
18 level is going to go way down for you, as far as  
19 trying to make sure that you get these materials. I  
20 may move more slowly in making sure you get  
21 documents, and move on to more pressing matters if  
22 you're going to sit there and do that. So counsel,  
23 talk to your defendants. And defendants, don't do  
24 it. It may sound interesting, it may sound fun, but  
25 don't do it. It's not going to help anybody, and

1 it's not going to especially help you.

2 All right.

3 MS. ARMIJO: Your Honor?

4 THE COURT: Ms. Armijo.

5 MS. ARMIJO: Before the return of them, can  
6 we make arrangements to have the inspection done  
7 since they'll be inspected anyway?

8 THE COURT: How quickly can that be done?

9 MS. ARMIJO: I believe the tablets are here  
10 in this building.

11 THE MARSHAL: Here, and in Las Cruces.

12 MS. ARMIJO: Here, and in Las Cruces.

13 THE COURT: Anybody have objection to the  
14 marshals checking them to see if they've been  
15 tampered with in any way?

16 MR. BENJAMIN: Your Honor, if we might just  
17 structure it so we can go downstairs at the end of  
18 the hearing, and just run through it, just counsel  
19 with a marshal present, would be my request.

20 THE COURT: Would that work for you?

21 MS. ARMIJO: I believe that they would need  
22 to know the password, is that correct? They would  
23 need to know their password. Their attorney --

24 THE COURT: What if the defendant gave  
25 their counsel the password and then they went down

1 and all of them look at it before they leave? Would  
2 that be okay?

3 THE MARSHAL: I'll bring them up here, Your  
4 Honor.

5 THE COURT: Okay, that's fine. SO they're  
6 going to bring them up here. Get your password from  
7 your client. Then you can come over there and look  
8 during a break, or something like that. That way, it  
9 won't interfere with them getting the defendants out.

10 Ms. Harbour-Valdez?

11 MS. HARBOUR-VALDEZ: Your Honor, for those  
12 of us who have already passed inspection, would our  
13 clients' tablets be returned today? I think Ms.  
14 Armijo is shaking her head yes.

15 MS. ARMIJO: Yes.

16 THE COURT: So if they've already been  
17 cleared, you'll get them back today.

18 MR. VALDEZ: Thank you.

19 THE COURT: All right. Let me get my  
20 papers here, and we'll go to the next issue.

21 All right. The next issue that I have is  
22 Ms. Johnson, an issue that I guess we've kind of  
23 talked about already. But it's your formal motion, I  
24 think, to -- for severance. I think that's the next  
25 one up. Is there anything more to be said on it?

1 MR. LOWRY: Your Honor, I have one  
2 housekeeping matter.

3 THE COURT: If Ms. Johnson wants to yield  
4 the floor, she can.

5 MS. JOHNSON: No problem.

6 MR. LOWRY: On the request to preserve --  
7 I'm a little concerned that a confidential human  
8 source is going to abuse their privileges, get their  
9 tablets back and be able to continue to tinker with  
10 the data that's on there. Can we have some kind of  
11 ruling on the preservation request?

12 THE COURT: I don't get the request. Are  
13 you basically roundabout asking that cooperating  
14 witnesses not get tablets?

15 MR. LOWRY: The ones that abused their  
16 tablet privileges, yes, Your Honor.

17 THE COURT: Well, I'm denying that request.  
18 All right. Ms. Johnson.

19 MS. JOHNSON: I'm sorry, Your Honor. You  
20 wanted for me to reargue my motion to sever?

21 THE COURT: Oh, I'm not excited about that.  
22 But I just -- you know, you did have a formal motion.  
23 You raised it earlier. Can we just consider  
24 everything you argued to have been argued, and I've  
25 denied the motion?

1 MS. JOHNSON: Well, Your Honor, there is  
2 still the Bruton issue. I've argued that. So I'd  
3 ask that the Court take it under advisement at this  
4 time, because we do raise the Bruton issue, and there  
5 are some very serious Bruton concerns.

6 And Your Honor, with all due respect, I  
7 understand the Court has denied the motion to sever.  
8 But I'd like to point out something, Your Honor, that  
9 the Court basically denied the defendants in Counts 1  
10 through 5 their motion to continue, which puts Mr.  
11 Gonzalez in a very tenuous situation, because you  
12 have defense counsel and their clients, essentially,  
13 all looking at Mr. Gonzalez, and in some form putting  
14 pressure on Mr. Gonzalez to cede his right to -- his  
15 constitutional and speedy trial right.

16 THE COURT: I'm rather confident you're not  
17 going to bend to any pressure here.

18 MS. JOHNSON: I won't, Your Honor. My  
19 concern is my client, in that he has asserted his  
20 right. And that, obviously, in a case of this nature  
21 you have one defendant who is strenuously asserting  
22 his right to a speedy trial, and you have defendants  
23 whose attorneys have said, "I'm not ready for trial."  
24 So what happens once they leave this courtroom is a  
25 concern that I have, Your Honor. And Mr. Gonzalez

1 insists on his right to a speedy trial.

2 So I, once again, would ask -- respectfully  
3 ask that the Court reconsider it, and perhaps grant  
4 the motion to continue as to Counts 1 through 5, and  
5 let us go to trial on Counts 13 through 16.

6 And as to the motion to sever, Your Honor,  
7 I think I've argued it, unless the Court wants me to  
8 continue arguing -- I'm happy to do that -- but I  
9 would ask that the Court not completely deny it,  
10 because we do have the Bruton issue.

11 THE COURT: All right. Thank you, Ms.  
12 Johnson.

13 Any other defendant on that issue?

14 Mr. Castellano, you've been charged with  
15 severances. Anything else you want to say on that  
16 issue?

17 MR. CASTELLANO: Just a question. What  
18 kind of pressure does she fear for her client,  
19 because -- something coercive from the other  
20 defendants? Is it something else? I just want to  
21 get clarification on that.

22 THE COURT: Well, if she wants to tell  
23 us -- Ms. Johnson?

24 MS. JOHNSON: I'm sorry. I didn't hear Mr.  
25 Castellano.

1 THE COURT: Well, he wonders what kind of  
2 pressure you're going to feel, that you're talking  
3 about. Are you worried about something physical or  
4 are you worried about something else.

5 MS. JOHNSON: No, Your Honor, not physical.  
6 But just a pressure for Mr. Gonzalez to, essentially,  
7 waive his right to a speedy trial, and to agree --  
8 because we are standing firm that we are going to  
9 trial. We are prepared to go to trial in July. But,  
10 obviously, we have concerns that pressures may be  
11 exerted. I don't have anything specific right now.

12 But I do know that counsel for Mr. Garcia,  
13 one of his attorneys has prepaid tickets to Europe  
14 with his family in July. So I'm very sorry.  
15 Perhaps, Mr. Cooper will try the case alone.

16 But that's a concern, Your Honor, that I  
17 think could be alleviated if the Court were to just  
18 allow Counts 13 through 16 to go in July.

19 THE COURT: All right. Thank you, Ms.  
20 Johnson.

21 Anything else, Mr. Castellano?

22 MR. CASTELLANO: No, Your Honor.

23 THE COURT: All right. Well, I'm going to  
24 deny the motion. I may take a look at the Bruton  
25 issue so I can give you, basically, kind of a motion



1 in limine, if I've got the tools to do that. But,  
2 for the reasons stated this morning, I'm going to  
3 deny the motion.

4 All right. The next motion that we go to  
5 is the motions we were arguing, I think, back in  
6 February, when we were conducting the hearing. So I  
7 think that's Mr. Sanchez' -- let's see, is it  
8 Sanchez'? Okay, yes. So I think it's Mr. Sanchez'  
9 motion to compel the Government to reveal IDs of CIs.

10 I had heard something that sounded like  
11 y'all were ready to -- y'all had an agreement on  
12 these; is that correct? Is this something that you  
13 need to come up here, Ms. Fox-Young, to --

14 MS. FOX-YOUNG: Your Honor, I think we'd  
15 just like to put our agreement on the record.

16 THE COURT: All right. Then why don't you  
17 come up, and maybe you and Mr. Beck can put it on the  
18 record together. Could y'all slow down and maybe  
19 then tell me specifically as to which motions, so  
20 that I make sure that we're taking care of motions.  
21 I know y'all are dealing with particular CIs, but I'm  
22 sort of dealing with motions. So help me out there.

23 MR. BECK: Yeah. And I'll go ahead and  
24 start, since I can barely read my own writing, and I  
25 don't expect Ms. Fox-Young to read it.

1 But I think the motions that we're  
2 discussing here -- and I will read the DeLeon  
3 document numbers -- are Document No. 815, that's Mr.  
4 Sanchez' motion; 817, Mr. Christopher Garcia's  
5 motion; 829, which is Mr. Baca's motion; 872, which  
6 is Mr. Alonso's motion; 869, which are Messrs. Troup  
7 and Billy Garcia's motion.

8 And so the agreement that the United States  
9 and the defendant have come to is sort of -- now,  
10 Your Honor is pretty familiar with these protective  
11 orders -- it will be -- we will disclose to the  
12 defendants in their respective cases, to all of the  
13 defendants, the CIs' identities, subject to an  
14 attorney's eyes only, and attorney's staff,  
15 obviously, protective order.

16 As the Court ordered in February, if that  
17 is -- if that doesn't work for a defendant, certainly  
18 we're not cutting off their ability to come to the  
19 court and ask for disclosure of those identities from  
20 the Court to their client. So if they feel they need  
21 to disclose those names to their clients, we're  
22 allowing them -- we're not foreclosing their ability  
23 to come to you and ask for that. And we've also said  
24 that we'll hear those requests, too, if they want to  
25 come to us before they come to the Court.

1 THE COURT: Now, does this motion just  
2 cover Ms. Fox-Young's motion, or this is all of them?

3 MR. BECK: All of them, right.

4 THE COURT: All right.

5 MR. BECK: We've also agreed that there are  
6 a certain number of -- I think Ms. Duncan called them  
7 known informants -- and I think she has a specific  
8 list of known informants. And so these, as the Court  
9 has seen in other cases, are informants that,  
10 basically, everyone knows who they are.

11 THE COURT: Pretty much everybody but me.

12 MR. BECK: Right. Everybody but you,  
13 that's right. You know some of them now.

14 With regard to those, as opposed to  
15 delineating a list, I think what's most reasonable --  
16 and I'll certainly let the defense attorneys disagree  
17 with me, if they disagree -- I think what's most  
18 reasonable is just to hold them to their obligations  
19 under this order; that if they knew who those people  
20 were before we disclosed the identities, they can  
21 continue to discuss those identities with their  
22 clients. If they learn it from this, from this  
23 disclosure, then those identities are subject to the  
24 protective order. And so we're not asking to -- for  
25 all the attorneys to come to us and tell us who they

1 know, or come up with a separate order. We're just  
2 willing to take them at their word that they're going  
3 to abide by the protective order.

4 The known CIs also include defendants who  
5 have pled guilty. So they would be able to discuss  
6 those former defendants who have pled guilty in these  
7 cases with their clients as well.

8 The last part of this is that we've  
9 asked -- to save, I think, a couple forests, we've  
10 asked that the --

11 THE COURT: A couple of what?

12 MR. BECK: Forests.

13 THE COURT: Okay.

14 MR. BECK: We've asked the defendants to  
15 withdraw their motions as opposed to asking the Court  
16 to rule on them. And we, the United States, have  
17 agreed that if a problem comes up we certainly won't  
18 hold them to those withdrawals. If a problem comes  
19 up, and they feel they need refile them, or withdraw  
20 their withdrawal, however the Court wants to go about  
21 that, that the United States won't stand in their way  
22 in doing that. So I think those are the United  
23 States' agreements. And if I missed something or I  
24 misstated something, I think I'll be corrected here  
25 shortly.

1 THE COURT: All right. Thank you, Mr.  
2 Beck.

3 Ms. Fox-Young, anything there you disagree  
4 with, Mr. Beck put on the record?

5 MS. FOX-YOUNG: No, Your Honor. Just to  
6 supplement, Mr. Beck informed the Court that the  
7 defendants -- and I won't speak for all counsel, but  
8 we reserve the right to litigate the issue as to  
9 whether our clients have access to the identities of  
10 the informants who do not fall into the category of  
11 known informants, as Mr. Beck described. And I think  
12 Mr. Beck said that.

13 He did not address -- and I don't think we  
14 have agreement as to the time period in which these  
15 identities will be disclosed. I'd suggest that --  
16 the Government has approached us, and they're ready  
17 to make this disclosure. It would be reasonable that  
18 the Court order the disclosure be made within 10 days  
19 or two weeks, something in that sort of timeframe. I  
20 don't know if the Government objects to that  
21 timeline.

22 And lastly, I think we could determine that  
23 the motions and the joinders would be moot upon  
24 disclosure, but as the Government indicates, could be  
25 reraised if we have an issue down the road.

1 THE COURT: Instead of you just withdrawing  
2 the motion?

3 MS. FOX-YOUNG: Whatever the Court's  
4 preference would be. I suppose we could withdraw and  
5 refile or just -- you know, the Court can order --

6 THE COURT: If there is a problem, then  
7 pinpoint the problem down the road?

8 MS. FOX-YOUNG: Yes, Judge.

9 THE COURT: All right. Let me ask  
10 Mr. Beck, anything that Ms. Fox-Young just said that  
11 you have any problem with?

12 MR. BECK: Not at all. Your Honor. And I  
13 think that was largely the agreement. I think in  
14 Mr. Garcia's stand-alone case we agreed to disclose  
15 one business day after the entry of the protective  
16 order. As I said to a number of counsel here, that  
17 disclosure was less robust than this one will be. So  
18 I don't know we can make that. But we will agree  
19 now -- so the Court doesn't have to order, we will  
20 agree to disclose the identities of these informants  
21 within 10 days -- I think that's the shorter end of  
22 what was proposed -- within 10 days of the entry of  
23 the protective order. And I will get a protective  
24 order to circulate within this group before the end  
25 of these hearings this week.

1 THE COURT: All right. Can you live with  
2 that, Ms. Fox-Young?

3 MS. FOX-YOUNG: Yes, Your Honor.

4 THE COURT: All right. If I could put my  
5 gloss on it. Let's have the motions withdrawn, and  
6 everybody understand they're being withdrawn without  
7 prejudice, so that if they need to be refiled, or  
8 probably refiled in some repackaged way, pointing out  
9 what the current problem is. Ms. Fox-Young, can you  
10 live with that?

11 MS. FOX-YOUNG: Yes, Your Honor.

12 THE COURT: Mr. Beck?

13 MR. BECK: Yes, Your Honor.

14 THE COURT: Okay. Mr. Castle?

15 MR. CASTLE: Your Honor, I take a slightly  
16 different approach to it. I think, if the Government  
17 is agreeing to do this, then the Court can order it.  
18 The problem is, if we withdraw our motions, and the  
19 Government agrees to do it, and then, for whatever  
20 reason, can't comply, we have to refile everything  
21 and we have to relitigate whether we're entitled to  
22 it.

23 If they're conceding we're entitled to it,  
24 then I don't see -- and it wouldn't take a forest.  
25 All it would take is a one-page document saying the

1 Government is conceding it, and therefore, the motion  
2 is granted.

3 The reason I'm concerned about this is, in  
4 the past, we have filed motions, and then the Court's  
5 ordered, and we still are in a position where we  
6 haven't received it, we'll be able to file a motion  
7 for sanctions with Your Honor. But if there is no  
8 order granting these motions, then we're back to  
9 square one, where we have to go through the whole  
10 process of showing why we needed these informants, et  
11 cetera.

12 In addition, in our reply to one of our  
13 confidential informants, they indicated that the  
14 person was deceased. And we -- in our reply, we  
15 indicated the Government needed to inform us when  
16 that person died, so that we could analyze it for  
17 whether it is grounds for a delay in indictment  
18 motion. So I don't know if the Government is willing  
19 to agree to provide that information to us. But we  
20 would ask for that addition.

21 THE COURT: Well, I guess if the Government  
22 is giving you the material, I'm not sure why you're  
23 forcing everybody to argue motions that they're  
24 giving, and me writing an opinion to determine  
25 whether you're entitled to it or not. If they're



1 giving you the information, seems like a lot of  
2 wasted effort.

3 MR. CASTLE: No. I think they're agreeing  
4 that they should produce it. That means that, you  
5 know, I don't think we have to argue it.

6 THE COURT: I think they're agreeing to  
7 produce it. So I'm not inclined to issue any order.  
8 I'm not inclined to write an opinion giving you the  
9 stuff. If there is a problem, you can come back to  
10 me.

11 MR. CASTLE: Okay. Then, with regard to  
12 the one informant that had died, can we have an order  
13 for the Government to let us know when that person  
14 died so we can make the appropriate motion?

15 THE COURT: Do you have any problem with  
16 that, Mr. Beck?

17 MR. BECK: You don't need to order that,  
18 Judge. If we have that information, we're happy to  
19 supply it.

20 THE COURT: All right. Thank you,  
21 Mr. Castle.

22 Mr. Adams?

23 MR. ADAMS: Yes, sir. Judge, I just wanted  
24 to make sure the record was clear on our motion. It  
25 was listed as 817, which is correct, in the 4268

1 case. It was number 146 in the 4275 indictment, and  
2 number 286 in the 1613 indictment.

3 And my only question of clarification is,  
4 for the 4275, we received a list of some of the  
5 documents as to who the sources were. And I assume  
6 we'll also be receiving the unredacted copies of the  
7 discovery at some time in the near future?

8 MR. BECK: No, Your Honor. And this goes  
9 to -- I mean -- so there are certain things that we  
10 redacted because they are PII. There are also  
11 certain things that we redacted because they are ways  
12 and means of investigation. So we won't be taking  
13 away those redactions, because they certainly would  
14 be telling about the way certain law enforcement  
15 agencies conduct confidential informants, which I  
16 don't think falls within Roviario, or Brady or Giglio.

17 So I will distinguish that, I think if  
18 there are certain documents that, perhaps, defendants  
19 want a birth date or something unredacted, we redact  
20 those, or addresses, PII, certain things like that,  
21 we might consider that.

22 But the disclosure in this case would be  
23 the identities. And so to give a little background  
24 to the Court and for all defendants, since everyone  
25 will be receiving this: The way that we put together

1 the disclosure in Mr. Adams and Ms. Sirignano,  
2 Mr. Garcia's drug trial case, is we put a letter  
3 together with the CIs' identity, and then the Bates  
4 numbers of reports where that CI is the CI in those  
5 reports.

6 So it's probably more than -- well, I don't  
7 know if it's more than they're asking for -- but they  
8 get a lot of information. I don't think that they  
9 need -- and I don't think it's proper to disclose  
10 information that would reveal certain methods and  
11 means of law enforcement.

12 THE COURT: All right. Mr. Adams?

13 MR. ADAMS: We'll take what they --  
14 pursuant to the agreement that people entered into,  
15 we'll take the list and see where that leads us. But  
16 our motion, Your Honor, had been to reveal the source  
17 and to unredact the materials. So I anticipate that  
18 we'll be back at least on some of these matters soon.  
19 If the Government looks at some of them, it may be  
20 that they can agree to do that. If not, we'll be  
21 here with all 17 motions.

22 THE COURT: Well, and I've ruled on this  
23 several times. And I'm not going to force the  
24 Government to just unredact stuff for everybody's  
25 interest. You've got to make a Brady showing.

1 They've got to look at it. If they're redacting  
2 material, they've got to look and see if it falls  
3 within Brady, Giglio, Rule 16.

4 But, you know, some of this stuff, like  
5 Social Security numbers and addresses of places, and  
6 stuff like that, I've cautioned everybody about. I'm  
7 not going to probably require the Government to  
8 disclose that stuff.

9 So, if you come back, come back with a real  
10 rifle shot, rather than just a shotgun wanting  
11 everything unredacted, because you're probably not  
12 going to win that.

13 MR. ADAMS: Yes, sir. Thank you.

14 THE COURT: All right. Other than  
15 Mr. Castle, it looks like everybody has got an  
16 agreement. Anybody --

17 MS. JACKS: As usual, I'm a cog in the  
18 wheel. Amy Jacks on behalf of Mr. Sanchez.

19 Here's my concern, and I was just  
20 discussing with Mr. Beck -- the first I heard of this  
21 agreement was at 1:12 this afternoon.

22 I think there is an issue with agreeing to  
23 never identify or discuss the identity of an  
24 informant with our clients. I think it's really a  
25 two-fold problem. One, I think it creates a

1 potential wall or problem just in client relations,  
2 where we know things that we aren't permitted to  
3 discuss with our clients.

4 But the other thing is, in order to perform  
5 the job of a defense lawyer competently, one of the  
6 things I'm supposed to do is discuss the witnesses  
7 with Mr. Sanchez, and find out what he knows about  
8 them, who they are, what sort of things they've been  
9 involved in, various areas that should be pursued  
10 with respect to investigation. And so I'm reluctant  
11 to agree to something where I'm never -- there is no  
12 mechanism for me to ever discuss the identity of that  
13 person.

14 THE COURT: You've got two choices: We can  
15 take up your motion and you can argue them, and I can  
16 decide whether they're going to be disclosed at all,  
17 or you can take the offer. What do you want?

18 MS. JACKS: What I don't want to do is be  
19 precluded from disclosing them or arguing about  
20 disclosing them.

21 THE COURT: I think Mr. Beck said you can  
22 come back to him, and we'll take them one at a time.  
23 I guess, if I were in your shoes, I'd take the  
24 information I have, you probably already know anyway,  
25 and see if you need to come back. And if you come

1 back, and Mr. Beck doesn't agree, you can come back  
2 to me.

3 MS. JACKS: And --

4 THE COURT: Otherwise, we take the motion  
5 up, and I'll decide whether you're going to get any  
6 disclosures this afternoon.

7 MS. JACKS: If we do agree -- and I want to  
8 have a chance to discuss that with my client -- we  
9 wouldn't be seen as waiving the argument that he is  
10 entitled to know their identity at some point.

11 THE COURT: I think Mr. Beck has made that  
12 clear this afternoon, that you're not waiving that  
13 argument.

14 MS. JACKS: Well, I have one other point,  
15 which is, in other situations like this, I think just  
16 the fact that this person might be a witness for or  
17 against my client permits me to discuss that with him  
18 at some point. So I'm not quite sure what additional  
19 showing would need to be made. It's unclear to me.  
20 And I'm not sure there is any case law on it. The  
21 fact is that the defendants possess information the  
22 lawyers don't about the bias, motive, and other  
23 interests of the witnesses that will be potentially  
24 testifying.

25 THE COURT: I'm not sure what you want me

1 to do with that.

2 MS. JACKS: Well, what I'd like is if as  
3 part of this agreement, that we are entitled to  
4 discuss the identity of these informants with our  
5 clients at a date prior to trial.

6 THE COURT: If you want that, we better  
7 take up your motions. It doesn't sound like you're  
8 part of the agreement.

9 MS. JACKS: Well, the agreement was  
10 published at 1:12 this afternoon, Your Honor. I was  
11 actually walking back from --

12 THE COURT: It's called court. We're  
13 having a motion hearing. What do you want,  
14 Ms. Jacks? Do you want to be part of the agreement  
15 or do you want to take up your --

16 MS. JACKS: What I'd like is an opportunity  
17 to discuss it with my client. What I don't want to  
18 cause is a problem between myself and Mr. Sanchez.

19 THE COURT: Well, we're having a hearing.  
20 Do you want me to take up your motion?

21 MS. JACKS: I think, in terms of my motion,  
22 my part of it, I think I fully argued it and sat down  
23 as of the last court hearing. We were in other  
24 people's joinders, I think.

25 THE COURT: All right. Other than

1 Ms. Jacks and Mr. Castle, anybody else have a problem  
2 with the agreement, as has been outlined by Mr. Beck  
3 and Ms. Fox-Young? Let me see if anybody else -- Mr.  
4 Castle, it's not directed at you right at the present  
5 time.

6 All right. So I'm going to then understand  
7 that the motions that have been directed by all the  
8 defendants, except Ms. Jacks and Mr. Castle, are  
9 going to be withdrawn. That will be 817, 829, 869 --

10 THE CLERK: Not 869.

11 THE COURT: Not 869. Let's see, 817, 829,  
12 and 872. 815 and 869 are the alive ones. So 817,  
13 829, 872 will be withdrawn pursuant to the agreement  
14 that we have. What's alive is 815, 869, which is  
15 Sanchez and Garcia respectively. Anyone else?

16 All right. So that's what I understand the  
17 agreement to be.

18 Mr. Castle?

19 MR. CASTLE: Yes, Your Honor. I thought  
20 the Court had talked me out of it up there, but --  
21 and I thought I, at that point, said okay. But if  
22 not, we'd prefer to have the agreement as outlined by  
23 the Government than to go through the hearing.

24 THE COURT: All right. So Mr. Castle joins  
25 the agreement, and his motion will be withdrawn.



1 He'll get the information. If he needs to come back,  
2 he will. What number is that?

3 THE CLERK: 869.

4 THE COURT: That's 869. All right.

5 MS. JACKS: And, Your Honor, I've had an  
6 opportunity to discuss things with Mr. Sanchez, and  
7 we will agree to withdraw 815 pursuant to the  
8 agreement.

9 THE COURT: All right. So 815 will be  
10 withdrawn as well. And that will be 10 days, then,  
11 from today, the identities will be disclosed. If  
12 people want more redactions, they want more  
13 information, they want to use it differently, they  
14 can -- those are withdrawn, but they're not withdrawn  
15 with any prejudice. They're free to renew those.

16 All right. So I'm looking at my number 11  
17 on the batting order, which I think is a sealed  
18 motion to compel Rule 16 and Brady materials in order  
19 to preserve law enforcement notes. And, Mr. Villa,  
20 Ms. Fox-Young, I believe these are your motions. I  
21 think the next two of them are as well. So if you  
22 want to argue them in different order you may.

23 MS. FOX-YOUNG: Thank you, Your Honor.  
24 We'd like to first argue the motion to compel, and  
25 then follow with the motion to seal, unless the Court

1 has an objection.

2 THE COURT: All right. Go ahead.

3 MS. FOX-YOUNG: Okay. Document 1037, which  
4 is our sealed motion to compel, asks for a number of  
5 categories of information.

6 I'll just tell the Court to begin, a number  
7 of these items pertain directly to the voluntariness  
8 of statements that Mr. Perez is alleged to have made.  
9 Of course, as the Court knows, the voluntariness of  
10 those statements is always an issue at trial,  
11 under -- we cited Dickerson versus United States.

12 In addition -- and we haven't yet filed  
13 it -- but we intend to file, as we've briefed, a  
14 motion to suppress involuntary statements by our  
15 client. And on that basis we ask for additional  
16 information pertaining to the circumstances  
17 surrounding these statements. We cite Rogers --  
18 well, we will cite Rogers versus Richmond in our  
19 motion to suppress.

20 As the Court knows, the prosecution has the  
21 burden at a hearing on a motion to suppress to  
22 provide the Court with a preponderance of evidence  
23 that the statement is voluntary. And so just as a  
24 backdrop, so the Court understands, that is a context  
25 for a number of our requests. So under -- pursuant

1 to Rule 16 and Brady and its progeny, we ask for  
2 first, any and all written and/or recorded statements  
3 made by Defendants Montoya, Armenta, and Martinez.  
4 These three defendants made at least -- each of them  
5 was interviewed, or proffered statements more than  
6 once in the immediate aftermath of the alleged murder  
7 of Javier Molina, much closer in time to any recent  
8 statements that they may have made.

9 And as we briefed, none of these  
10 defendants' prior statements to law enforcement  
11 mentioned Rudy Perez in any way. They don't mention  
12 his involvement in the murder or conspiracy to murder  
13 Javier Molina.

14 And these defendants all made statements in  
15 2014. The murder is alleged to have occurred in  
16 March 2014. And so we asked for the recent  
17 statements that we believe these defendants made as  
18 part of their cooperation with the Government.

19 The Government points out that in our  
20 initial request we made a broad request for any and  
21 all statements made by these defendants. In our  
22 reply we note that we confined this request to  
23 statements made with respect to the murder of Javier  
24 Molina, with respect to Counts 6 and 7. And the  
25 Court should know that the prior statements that

1 these defendants have made, produced in discovery,  
2 with regard to Mr. Perez, are entirely consistent  
3 with our client's contention that he did not conspire  
4 to murder Mr. Molina by allowing pieces of his walker  
5 to be taken for the murder. And so there simply is  
6 no other evidence from these defendants that  
7 Mr. Perez conspired and participated in that murder.  
8 Mr. Perez was in his cell at the time Molina died,  
9 and he was not a hands-on participant.

10 So we ask for those statements. I think  
11 they're clearly exculpatory and should be turned over  
12 immediately. And we cite Sommers; the prosecution  
13 has an affirmative duty to disclose exculpatory  
14 evidence on those.

15 The second category --

16 THE COURT: Well, let's take these one  
17 category at a time --

18 MS. FOX-YOUNG: Sure.

19 THE COURT: -- and maybe I can sort of get  
20 my mind around each one of these categories.  
21 Anything else you want to say on this first category?  
22 What you're calling the "first category," it's your  
23 paragraph 2 in your motion; correct?

24 MS. FOX-YOUNG: In our motion, it is 1-A,  
25 beginning on page 9, and continuing to page 11. I

1 guess, Your Honor, I'd just add that these materials  
2 are clearly in the custody and control of the  
3 Government. We think that they're likely to uncover  
4 further admissible evidence, to help prepare our  
5 witnesses, to inform our trial strategy, and to  
6 assist in impeaching these witnesses, and in  
7 rebuttal. And we'd cite Case versus Hatch, Tenth  
8 Circuit case from 2013. I think this clearly meets  
9 the materiality standard with respect to these  
10 statements. We really require them in order to  
11 properly investigate the case in advance of trial,  
12 for additional witness interviews, investigation, and  
13 other -- obtaining other information from sources  
14 prior to trial.

15 THE COURT: All right. Thank you, Ms.  
16 Fox-Young. I know you had some people join you in  
17 this motion. Anyone else want to speak on -- I guess  
18 we're talking about the written and recorded  
19 statements of Montoya, Martinez, Armenta. Anyone  
20 else?

21 All right. Let me have the Government  
22 respond. Let me see if I can take these in bites, so  
23 I can get a handle on it. Mr. Beck, are you arguing  
24 this motion?

25 MR. BECK: It sounds like it.

1 THE COURT: I assume there are some written  
2 and recorded statements of these three individuals  
3 that have not been produced?

4 MR. BECK: Yes, Your Honor. And those are  
5 being withheld as Jencks materials, now that they are  
6 Government witnesses in this case.

7 The United States understands that there  
8 may be materials that may be Brady or Giglio,  
9 depending on what is said in these, and the United  
10 States is reviewing those.

11 THE COURT: So you're going to take a  
12 Jencks, Giglio, and Rule 16 review, and if you see  
13 any Brady, Giglio, Rule 16, you'll produce that  
14 immediately, and then the rest of it is Jencks  
15 material, and you'll produce -- what's the date now  
16 for this trial?

17 MR. BECK: The date for this trial, I don't  
18 know has been set. This is the trial that now is the  
19 second half of the severance order.

20 THE COURT: I didn't ask that question very  
21 well. But when are you going to disclose the Jencks  
22 material before the trial?

23 MR. BECK: I think the Brady material -- I  
24 think our discovery obligations and disclosure  
25 obligations for Brady and Rule 16 are ongoing.

1 THE COURT: Right. But you had indicated  
2 that y'all were going to do Jencks at a certain  
3 period, I thought, before trial. Is my memory off?

4 MR. BECK: No, I think that's right. I  
5 don't have that in front of me. With the different  
6 trials that we have going here, two months?

7 MS. ARMIJO: Two weeks.

8 THE COURT: Two weeks before trial would be  
9 your Jencks disclosure.

10 MR. BECK: Right. So these statements from  
11 Montoya, Armenta, and Martinez that were taken after  
12 they agreed to plead guilty, in conversations with  
13 the Government after this had taken place, are Jencks  
14 statements, now that they are witnesses in this case.  
15 The United States understands, of course, that for  
16 certain information provided by these folks that will  
17 be Brady and Giglio material, and that we will have  
18 to disclose pursuant to that. And we are reviewing  
19 those, we'll review those, and disclose them.

20 And I think Ms. Fox-Young is correct, that  
21 given the statements before these defendants pleaded  
22 guilty, that may make more material Brady-Giglio than  
23 would otherwise be.

24 So I'm sure that's an insufficient answer  
25 for her without timing here. But the United States

1 understands where she's coming from, and is reviewing  
2 and will review closely this material and disclose  
3 it.

4 THE COURT: All right. Thank you, Mr.  
5 Beck.

6 That sounds like all you're entitled to.  
7 Do you think you're entitled to more? I know you'd  
8 like more. But do you think you're entitled to more?

9 MS. FOX-YOUNG: Your Honor, I think we're  
10 entitled to all the Brady and Giglio that these  
11 statements contain.

12 First, I'd just like to point out that a  
13 member of the prosecution team, at least one, was  
14 present for all of these statements. So I'm not sure  
15 what extensive review would need to be made. At the  
16 time of the statements, the Government was made aware  
17 of their content. So I think the production should  
18 be immediate or near immediate.

19 But, secondly -- I'm sorry, Your Honor, did  
20 you have a question?

21 THE COURT: Well, you know how that goes.  
22 I mean, they probably have an FBI agent preparing a  
23 302, and they've got to read the 302, and then make a  
24 line-by-line determination as to whether it's  
25 produced now or it's Jencks material. So that can



1 take a little time.

2 MS. FOX-YOUNG: I understand that can take  
3 a little time. We're several weeks out. I think we  
4 may be at least six weeks out. So I don't know what  
5 further delay would be justified.

6 Secondly --

7 THE COURT: Let me ask Mr. Beck: Can we  
8 put a deadline on when you'll complete your Brady,  
9 Giglio, and Rule 16 review, to decide which, maybe,  
10 category this goes into?

11 MR. BECK: Sure. There is a lot of  
12 statements here. I understand we've got to review  
13 that. So I would say 30 days would be sort of the  
14 short end, but we could get it done by then, which I  
15 think would be June 9, if we're looking at today.

16 THE COURT: What do you think about that,  
17 Ms. Fox-Young?

18 MS. FOX-YOUNG: We'd like it as soon as  
19 possible. But I understand the Government is working  
20 on it, if the Court is comfortable with that  
21 timeline.

22 But I would say, backing up, I think we're  
23 entitled to the statements in their entirety. And  
24 here is why: As Mr. Beck has acknowledged -- and  
25 we've briefed and argued the prior statements of

1 these defendants are exculpatory to Mr. Perez. And  
2 so the recent statements made in the context of their  
3 cooperation, contemporaneous with their pleas, are  
4 either consistent and also exculpatory, or clearly  
5 impeachment. Clearly, Giglio material, because  
6 they're given in exchange for favorable treatment.  
7 And think we're entitled to the statements in their  
8 entirety on that basis. Not merely to a review,  
9 which of course, the Government should be doing as a  
10 matter of course on all of this material for Brady  
11 and Giglio.

12 I would also like to address the Jencks  
13 deadline, but I think that's a separate issue.

14 THE COURT: Let me ask Mr. Beck: Do you  
15 see a flaw in what Ms. Fox-Young is saying? I mean,  
16 that sounds -- if I was about to undertake your task,  
17 I would think, with those eyes, that makes some sense  
18 to me. Do you see any flaw in it?

19 MR. BECK: Well, I think there is  
20 additional information. And that would be that there  
21 appeared to be statements from these defendants out  
22 there that the United States doesn't have. So I  
23 think we've talked about, a number of times, their  
24 reciprocal discovery in this case, which I think the  
25 deadline has now passed. We haven't been provided

1 reciprocal from all defendants. We have been  
2 provided reciprocal discovery from some. And I think  
3 Ms. Fox-Young and Mr. Villa are included in that;  
4 they have provided us with reciprocal discovery. So  
5 for those statements we don't have, obviously, we  
6 can't compare those with the newer statements.

7 Now, turning to what, I think, she's  
8 getting at, that the entire statements may be Giglio,  
9 I think she has a valid point there. I think courts  
10 also distinguished disclosure obligations in terms of  
11 timing. And I think this Court has distinguished  
12 disclosure obligations in terms of timing between  
13 Brady and Giglio. Brady comes earlier. Giglio must  
14 be before the defendant pleas. So I certainly see  
15 what she's getting at.

16 And you asked me to answer a question, and  
17 like any good attorney, I deflected.

18 THE COURT: Well, you'll look at these  
19 documents with --

20 MR. BECK: I see her point.

21 THE COURT: Because now you've had the  
22 benefit of defense counsel saying how they're going  
23 to use this. And I'm not quickly coming to -- I  
24 don't quickly see a flaw. So take a careful look at  
25 them with their arguments in mind.

1 All right. Did you want to address the  
2 Jencks? Do you want to tackle that one, or have we  
3 already beaten that up enough over the last few  
4 months?

5 MS. FOX-YOUNG: I think we have thoroughly  
6 covered and beaten that dead horse. And I think we  
7 can address that in the context of our --

8 THE COURT: Some dead horses need beating.

9 MS. FOX-YOUNG: In the context of our  
10 scheduling order, although I would say that I think  
11 that in this case an earlier Jencks deadline is  
12 warranted. But we can discuss that separately.

13 So on this category, we'd ask the Court,  
14 particularly based upon Mr. Beck's recent assertions,  
15 not just to ask the Government to do a review, but to  
16 disclose the statements. If there are statements by  
17 these defendants that have nothing to do with the  
18 Molina case, with Counts 6 and 7, we're not asking  
19 for those. But I think Brady -- I think even the  
20 Government concedes that they constitute Brady and  
21 Giglio material. I don't know what the Government  
22 cites, and I'm not aware of this Court's rulings  
23 about Giglio being producible later --

24 THE COURT: I don't think he's drawing a  
25 distinction there. Right, Mr. Beck? You're going

1 to --

2 MR. BECK: No, Your Honor, I think there is  
3 a distinction between the timing of disclosure of  
4 Brady and Giglio material.

5 THE COURT: From Jencks?

6 MR. BECK: No, from each other. I think  
7 this Court has looked at it in many opinions. I  
8 think the Tenth Circuit and the Supreme Court have  
9 looked at it in Giglio, which is impeachment  
10 material, they have said basically equates to Brady,  
11 in terms of whether it may materially alter the  
12 outcome of the case. So, substantively, they have  
13 said -- and "they" being this Court, the Supreme  
14 Court, the Tenth Circuit -- have held that  
15 impeachment material may materially alter the  
16 outcome. And so it is on the level with Brady. But  
17 they have made a distinction in terms of the timing  
18 of disclosure, and they have said that Giglio  
19 information must be disclosed before the defendant,  
20 basically, can plead guilty. The courts have held  
21 that that comes right up to the morning of trial.  
22 And I don't think we're holding this stuff for the  
23 morning of trial.

24 But I do think that there is a difference,  
25 in terms of when you must disclose exculpatory

1 material under Brady, and when you must disclose  
2 impeachment material under Giglio. Those two things  
3 are different.

4 THE COURT: Well, if I have said that in  
5 the past, I certainly don't mind being reminded of  
6 it. So if you have a cite to my opinions, or  
7 something where I've said in the past, you may well  
8 be right.

9 MR. BECK: I'm not sure you put it in my  
10 words, which are great. But I think that Your Honor  
11 has cited to the Supreme Court decision, as I was  
12 looking at it last week. And I will find whichever  
13 of Your Honor's opinions --

14 THE COURT: Let's do this, because it's not  
15 coming to my mind for me: For the present time I'm  
16 not drawing a distinction between Giglio and Brady  
17 for timing purposes. I'll make that ruling subject  
18 to reconsidering, if I've written on this and made a  
19 distinction in the past. I certainly have made  
20 distinctions between Brady, Giglio, Rule 16, and  
21 Jencks. But I don't recall making a distinction  
22 between Giglio and Brady. So I'll make that ruling,  
23 but it will be subject to the maybe revisiting, if  
24 I'm reminded that I've made an informed decision in  
25 the past otherwise.

1 MS. FOX-YOUNG: Okay. Your Honor, just to  
2 clarify, is the ruling that the statements are to be  
3 produced, or that they are to be reviewed?

4 THE COURT: They're to be reviewed. If you  
5 can live with the June 9th date, they'll need to  
6 produce all Brady, Giglio, Rule 16 material. They  
7 need to be reviewed with the eyes of the arguments  
8 that you made and then the Jencks material be  
9 produced 14 days before trial.

10 MS. FOX-YOUNG: Okay. Thank you.

11 THE COURT: So there may be some statements  
12 that, you know, they make a statement that they don't  
13 fall within Brady or Giglio or Rule 16, and so they  
14 don't have to immediately disclose them. And if they  
15 don't, then it comes to you two weeks before trial.

16 MS. FOX-YOUNG: All right. Thank you, Your  
17 Honor.

18 Is the Court looking at the clock?

19 THE COURT: We can keep going.

20 MS. FOX-YOUNG: Okay. We'll move to the  
21 second category of materials, which begins on page  
22 11, Subsection B. And that's plea addenda for the  
23 same defendants: Defendants Montoya, Armenta, and  
24 Martinez have each pled guilty to Counts 6 and 7, and  
25 their plea agreements -- not the addenda to those

1 plea agreements -- but the plea agreements have been  
2 made public. And, Your Honor, we argue that -- and I  
3 think it's pretty clear that the plea addenda for  
4 these defendants contain something with regard to the  
5 benefits that each these cooperators expect to  
6 receive in exchange for subsequent testimony. And  
7 this really is classic impeachment material.

8 So pursuant to Brady, and also pursuant to  
9 Rule 11 of the Federal Rules, we cite United States  
10 v. Roybal -- which is your case from 2014 -- the  
11 addenda should be turned over. "Rule 11(c)(2)  
12 provides very clearly that parties must disclose the  
13 plea agreement in open court when the plea is  
14 offered, unless the court for good cause allows the  
15 parties to disclose the plea agreement in camera."  
16 We have reviewed the public recorded -- the  
17 recordings of the public portions of these  
18 defendants' pleas, and there was no good cause  
19 finding, there were no findings whatsoever by the  
20 magistrates who took these pleas. The Government did  
21 not provide any basis for good cause to refrain from  
22 disclosing the addenda, or to allow them to disclose  
23 the addenda in camera. And there is some allowance  
24 under the rule and the case law that that may be  
25 done. But Rule 11(e)(2) is very clear that all



1 material terms or material details or elements of  
2 agreements must be disclosed.

3 THE COURT: So you don't know if there is  
4 an addenda? You're just saying, if they exist, you  
5 want them turned over?

6 MS. FOX-YOUNG: Well, Your Honor, I don't  
7 know 100 percent, although addenda are referenced in  
8 the pleas. The written pleas could be boilerplate  
9 language, but I don't think it is. And based upon  
10 the hearings that were conducted, it's clear that  
11 there were some portion of the plea hearings that was  
12 done at the bench. And we believe the subject of the  
13 plea addenda was discussed there. And so for all  
14 those reasons, we think we're clearly entitled to the  
15 addenda.

16 Additionally -- and the Court has made  
17 reference to the First Amendment right to access  
18 documents, materials, portions of the case, and  
19 portions of documents, in this case in a prior  
20 hearing, which we cite from June 2, 2016. When the  
21 Court deals with the issue of filing documents under  
22 seal, and the encourages the parties not to file  
23 documents under seal without a basis, the Court there  
24 is really dealing with the First Amendment right that  
25 we see in Copley, In Re: Copley Press, Inc. from the

1 Ninth Circuit 2008, which we cite, which says, "The  
2 public has a First Amendment right to access the  
3 cooperation addendum in that case to a plea  
4 agreement," finding that the district court did not  
5 abuse its discretion in unsealing those portions of  
6 documents, describing cooperation.

7 We also cite the D.C. District, Washington  
8 Post versus Robinson, where the Court vacated orders  
9 sealing a plea agreement of a criminal defendant who  
10 cooperated in the prosecution of Mayor Barry, for  
11 cocaine possession, and saying the same thing:  
12 "Under the First Amendment, plea agreements are  
13 presumptively open to the public and the press."

14 We cite U.S. versus McVeigh: "Sealed  
15 orders are really to be narrowly tailored to the  
16 compelling fair trial interests at stake." And other  
17 cases. I won't go through everything.

18 For all those reasons, pursuant to Brady,  
19 Rule 11, and the First Amendment, we don't think the  
20 requisite findings have been made by this Court or by  
21 a magistrate to seal these materials and to prevent  
22 Mr. Perez from accessing them. And we think the  
23 Court should order them disclosed.

24 THE COURT: Well, I can disclose I don't  
25 think I've taken a single plea in this case. So, you

1 know, I can sort of indicate that I haven't ordered  
2 it. So if anything is being ordered, it's being done  
3 at the magistrate judge level.

4 MS. FOX-YOUNG: Yes, Your Honor. When I  
5 said "the court," I meant broadly.

6 THE COURT: I know. I know, but I just  
7 wanted to indicate that -- so when I'm asking  
8 questions here, it's because I don't know what  
9 exists, because I haven't sealed anything.

10 MS. FOX-YOUNG: So it's our position that  
11 Mr. Perez' right to a fair trial is impaired, the  
12 withholding of these addenda, for these reasons.

13 THE COURT: All right. Anybody else want  
14 to speak on that before I hear from Mr. Beck?

15 Mr. Beck, let me ask questions here. If  
16 you don't want to answer, we can figure out what to  
17 do. But the first question: Are there addenda to  
18 the plea agreements?

19 MR. BECK: I'm thinking about how to answer  
20 this. I think it depends on how Your Honor, and I  
21 guess the rules committee -- which we'll never  
22 know -- defined "plea agreement." Because I think  
23 there are different ways. I think there can be a  
24 written plea agreement. And in some of these cases  
25 there certainly are addenda. But in some of these

1 cases the addenda was entered after the plea  
2 agreement was entered by the defendant, but it was  
3 contemplated at the time. So I guess, without making  
4 too fine a distinction, the answer would be yes.

5 THE COURT: All right. And are those filed  
6 under seal?

7 MR. BECK: They are not filed at all. I  
8 believe -- I don't have a plea agreement in front of  
9 me -- but I'm sure everyone else in this room is much  
10 more familiar with the plea agreements than I am --  
11 in this district than I am. But I believe the plea  
12 agreement refers to the plea agreement in any  
13 addenda. It doesn't say that the addenda --

14 THE COURT: That's just standard plea  
15 language; correct?

16 MR. BECK: That's my understanding.

17 THE COURT: Well, let me --

18 MR. BECK: So I guess I don't see any  
19 requirement that a good cause finding needs to be  
20 made on the record specifically. I do -- I have read  
21 the comments to the rules. And I don't have them in  
22 front of me, but I believe there is a rules committee  
23 comment that says that the good cause findings can be  
24 made on the record or in camera on a case-by-case  
25 basis. And that's -- so that's not a quotation, but

1 memory serves me, that's sort of --

2 THE COURT: Well, without arguing whether  
3 these were properly sealed, or if they were never  
4 filed -- I guess if they're never filed -- I'll come  
5 back to some questions I have on that -- but would  
6 you agree that they're Brady material, or at least  
7 Giglio material?

8 MR. BECK: If I were sitting in Ms.  
9 Fox-Young's shoes, I would want to impeach the  
10 witness with it.

11 THE COURT: So regardless of how we got  
12 here, do you have any problem with me ordering the  
13 production of the addenda to plea agreements?

14 MR. BECK: Yes, I do. But I can see that  
15 you probably would have legal grounds to find that  
16 they are Giglio. And as you're ordering us to  
17 produce Giglio, you'd likely conclude that we produce  
18 those as Giglio.

19 THE COURT: Yeah, it seems to me this is  
20 sort of classic impeachment material. What did you  
21 get from the Government to sit here and testify? So  
22 I think it's got be turned over. I'll take a look at  
23 your -- anything you want to say on timing. It seems  
24 to me it's probably --

25 MR. BECK: I think you and Ms. Fox-Young

1 are right. I think it is impeachment material and it  
2 is Giglio.

3 THE COURT: We don't need to tackle this  
4 issue today, but it gives me a little concern to find  
5 out that there are continuing agreements after a plea  
6 is taken.

7 MR. BECK: No. I hear what you're saying,  
8 and I misspoke about that, because I agree --  
9 because, obviously, like I said, everyone in here is  
10 more familiar with plea hearings than I am, but --  
11 maybe not everyone, but most -- they ask: Are there  
12 any other agreements that you have before you enter  
13 this plea. And I misspoke, that I think in one or  
14 two cases it was signed immediately after. But it  
15 was part -- and that's why I said it is -- the plea  
16 agreements have addenda, because it is part of the  
17 agreement. So the parties contemplate that.

18 THE COURT: Okay. Well, just give some  
19 thought that, if you have some defendants who are  
20 entering into additional agreements afterwards --

21 MR. BECK: Well -- and that's what I'm  
22 saying I misspoke about is -- and why I said it  
23 depends on what the Court and the rules committee are  
24 referring to as a plea agreement, and I think that's  
25 a distinction we made in contract law.

1           What I'm saying is is that the addenda are  
2 part of the plea agreements. It may have been signed  
3 after the plea hearing, but all the parties entered  
4 into the addenda with the plea agreement, even if it  
5 wasn't -- and we're not talking days or months or  
6 weeks or minutes. We're talking, like, immediately  
7 afterwards. So that's what I'm saying, is that --

8           THE COURT: Well, let's do this: We don't  
9 need to get into it much today. But you may want to  
10 go back and look at those with the defendants.  
11 Because most of my experience has been that, when I  
12 take a plea, you know, they're sitting at the podium,  
13 and they're signing it right there, or confirming  
14 it's their signature, and it's a very formalistic  
15 thing. If there is agreements afterwards, just give  
16 some thought whether they need to be repled, so that  
17 the defendant goes through a colloquy with the  
18 magistrate judge or the judge to make sure that they  
19 know what they're giving up, and what they're -- what  
20 the agreements are. It gives me a little bit of  
21 concern if there is stuff going on afterwards.

22           MR. BECK: That's why I was trying to clear  
23 it up with Your Honor. I understand what Your Honor  
24 is getting at. And it doesn't cause me any concern  
25 about the plea colloquy and those --

1 THE COURT: Covered what was in the  
2 addendum?

3 MR. BECK: I understand what Your Honor is  
4 getting at.

5 THE COURT: Okay. So it sounds like you're  
6 going to get these right. At the moment you're going  
7 to get them with the Brady material. That's subject  
8 to looking at something where I may have said that  
9 Giglio and Brady could be split up as far as timing.

10 But, Ms. Duncan, did you have something you  
11 wanted to say on this issue?

12 MS. DUNCAN: Your Honor, just briefly.

13 This is a matter of judicial economy. I  
14 understand that the defendants -- many of the  
15 defendants who have entered into guilty pleas so far  
16 will be testifying at trial against various  
17 defendants, and at least one other defendant who will  
18 be testifying against Mr. Baca. So given the  
19 acknowledgment that these addenda are Giglio  
20 material, we'd just ask that the Court's order  
21 encompass all the addenda for the defendants who have  
22 pled so far in this case.

23 THE COURT: Any objection to making this  
24 ruling for all the defendants, Mr. Beck?

25 MR. BECK: No, Your Honor.



1 THE COURT: So it will include all  
2 defendants.

3 Ms. Fox-Young?

4 MS. FOX-YOUNG: Your Honor, not to belabor  
5 the point at all, but I wonder if the Court might  
6 order a slightly earlier disclosure -- since there is  
7 no review that needs be done -- earlier than June 9.  
8 I understand there is a review of the statements,  
9 potential redactions. But here, the Government has  
10 all the addenda. It seems to me they could be  
11 disclosed within a matter of a couple of days.

12 THE COURT: Can we -- do you want to -- do  
13 you got an earlier date on this one, Mr. Beck?

14 MR. BECK: Hold on. I've got four voices  
15 in my head, and only one of them is external right  
16 now. I think we need 30 days on this as well. And  
17 I'm not sure if that's what the Court was asking. I  
18 think 30 days is -- we just moved offices in Las  
19 Cruces. Our servers and files and things have been  
20 moved around. So we know in which files these  
21 documents are. We may not know where the files are.  
22 And so I think we need 30 days to disclose these.  
23 But I will represent to the Court that if we locate  
24 them earlier, and we can get them out within 30 days,  
25 we will.

1 THE COURT: Well, I think on this, this is  
2 pretty mechanical. Just take all the people that  
3 have pled and pull up the addendum. Let's try to get  
4 these -- I'll put 14 days, so two weeks from today.  
5 So let's try to get these expedited, because I  
6 think -- I can't think of much that would need to be  
7 reviewed on these. So I'll set a deadline of 14 days  
8 on those.

9 Ms. Fox-Young, I need to give Ms. Bean a  
10 break. So why don't we take our afternoon break.  
11 We'll be in recess for about 15 minutes.

12 (The Court stood in recess.)

13 THE COURT: Like I say, if y'all want to  
14 keep your jackets off, that's fine with me.

15 All right. Ms. Fox-Young, you had the  
16 floor. Do you want to continue? Do you want to  
17 yield to Ms. Johnson? Or did you want to go ahead?

18 MS. FOX-YOUNG: Certainly, Your Honor.

19 MS. JOHNSON: Thank you, Your Honor. And I  
20 appreciate the Court's indulgence. Erlinda Johnson  
21 on behalf of Santos Gonzalez.

22 Your Honor, I just wanted to make it clear,  
23 put something on the record about something I said  
24 earlier regarding the motion to sever and the motion  
25 to continue. When I made a statement that I was

1 concerned about pressure being exerted on my client,  
2 I want to make it clear -- and my client would like  
3 for me to make it clear -- that no one has exerted  
4 any pressure on him whatsoever. He has not  
5 experienced that. Neither have I. That was just a  
6 concern that I had in terms of the Court putting us  
7 in somewhat of a difficult situation.

8 I also made a comment about --

9 THE COURT: Me putting you in a difficult  
10 position?

11 MS. JOHNSON: I also made a comment about  
12 Mr. Castle having prepaid tickets. I stand  
13 corrected. They were not for July; they're for June.  
14 Because I was concerned that he would have to miss  
15 his family vacation.

16 But my client wanted me to make sure that  
17 it was on the record that he doesn't feel pressure.  
18 No one has pressured him.

19 THE COURT: All right. Thank you, Ms.  
20 Johnson.

21 (A discussion was held off the record.)

22 THE COURT: All right. Ms. Fox-Young.

23 MS. FOX-YOUNG: Okay, Your Honor. I  
24 understand the Court has ordered the Government to  
25 disclose all plea addenda, sealed or unfiled, any

1 plea addenda that exists within 14 days. And I just  
2 wanted to clarify, I assume that the Court's ruling  
3 covers the 1613 case, the 4268 case, the 4269 case --  
4 and I don't know the case number, but Richard  
5 Gallegos' case -- given that any addenda that exist  
6 for any defendants cooperating in those cases would  
7 apply to -- or pertain to, and be Giglio for all the  
8 defendants present today. And so I just wanted to  
9 clarify whether that's the Court's order, and also  
10 ask that the obligation to disclose the addenda be  
11 ongoing and immediate, if any others are entered into  
12 going forward.

13 THE COURT: I think that makes sense. Do  
14 you want to be heard on that, Mr. Beck?

15 MR. BECK: Well, I mean, I think the way  
16 that this came up is, if there is a certain defendant  
17 we're using in 1613 only, his -- as they are all  
18 "him" at this point, although they may be a "she" at  
19 some point -- his or her addendum is only impeachment  
20 information for defendants in 1613. So the  
21 defendants in 4268, 4269, and 4275 aren't entitled to  
22 that person's addendum as impeachment information,  
23 because it's not impeachment information in their  
24 trial.

25 THE COURT: Well, that wasn't your point,

1 was it? But it's a good point. But the point I  
2 think Ms. Fox-Young was raising -- correct me if I'm  
3 wrong -- is that this needs to be a ruling across the  
4 four cases, and it needs to be prospective. But I  
5 think Mr. Beck is making a separate argument and  
6 saying he should only have to disclose the addendum  
7 to his co-defendants -- to the co-defendants. I  
8 guess I think that may make some sense as well.

9 MS. FOX-YOUNG: The Court is correct as to  
10 what my point was. But we also argue that the  
11 addenda should be disclosed across the cases.  
12 Because, while the Government has to prove up  
13 different elements in the RICO case than in the VICAR  
14 case, there is cooperation across the cases. And so,  
15 if you look at the pleas -- and I don't have any to  
16 cite specifically to the Court, but I could pull  
17 them -- in each case there is discussion of the  
18 existence of the SNM, proving up the racketeering  
19 conspiracy. And so, generally, it applies to all the  
20 defendants.

21 Now, there are certainly -- with respect to  
22 Montoya, Armenta, and Martinez, for instance, there  
23 are specific statements that go directly to Counts 6  
24 and 7, and that's Giglio. But it's still Giglio --  
25 all these addenda contain Giglio as to all the

1 defendants, given the common elements across the  
2 cases. So definitely, Judge, we think the order  
3 should apply to all cases, but that they should be  
4 disclosed across the cases to all counsel.

5 THE COURT: I guess I'm not seeing that.  
6 That seems kind of broad. I guess, for the present  
7 time, I'm just ordering the production to the  
8 defendants in the case, so it will just be the  
9 co-defendants. But I'm having a hard time seeing --  
10 I mean, to a certain degree -- I mean, it depends on  
11 which case they're going to be called in before it's  
12 useful Giglio material. If they're never called,  
13 it's not very useful. It's hard for me to sort of  
14 figure out why they would be called in a different  
15 case.

16 MS. FOX-YOUNG: Your Honor, I'll give you  
17 an example, and I just discussed it with Mr. Beck  
18 during the break. I asked if the Government would  
19 oppose, in Richard Gallegos' case, that his addenda  
20 be disclosed. And he told me: It doesn't pertain to  
21 4268, but it pertains to 1613. So without going  
22 through each one and making -- and I don't know if  
23 that's entirely true, if it may pertain to 4268. But  
24 there certainly is a cross-pollination. There is  
25 certainly -- these cooperators are cooperating

1     against defendants without regard to what indictment  
2     they're charged in. And so, I mean, if the Court  
3     wants to order the Government to review the  
4     addenda -- I mean, initially, to make the disclosure  
5     to all co-defendants in each case, but I think the  
6     Court should also order the Government to review the  
7     addenda for Giglio as to defendants in other cases.  
8     Because, certainly, there are cases where they  
9     clearly contain Giglio material for defendants in  
10    other cases.

11                 THE COURT: Well, that probably needs to be  
12    done. So you may win the war here -- or the battle,  
13    Mr. Beck, but you may end up having to do a lot of  
14    work to keep from producing it to certain people.  
15    But I do think, if you're not going to produce them  
16    across the board, you're probably going to have to do  
17    a Brady, Giglio, Rule 16 review to see if it needs to  
18    be produced anyway.

19                 MR. BECK: I think that's right. And I  
20    mean, it's impeachment information. If you're going  
21    to impeach that person because they're a witness at  
22    trial. So if they're not a witness at trial, they're  
23    not going to be impeached.

24                 It's not a whole lot of work, because the  
25    addenda aren't -- it's not a huge amount of work,

1 compared to everything else in this case. So --

2 THE COURT: Well, I'll let you preserve  
3 your position of not having to produce it to anybody  
4 but co-defendants. But then, for the defendants in  
5 the other cases you're probably going to need to put  
6 on your Brady and Giglio and Rule 16 glasses, and see  
7 if they need to be produced for other reasons.

8 MS. FOX-YOUNG: Your Honor, I'll yield to  
9 Ms. Harbour-Valdez.

10 THE COURT: All right.

11 MS. HARBOUR-VALDEZ: Your Honor, I have a  
12 specific example in our case. Frederico Munoz was  
13 indicted in 1613, but his factual basis of his plea  
14 agreement specifically mentions Edward Troup, and I  
15 believe Javier Alonso. So we would request that his  
16 at least be released to the 4268 defendants.

17 THE COURT: Any thoughts on that, Mr. Beck?

18 MR. BECK: I mean, the same thought. If  
19 it's impeachment material in the 4268 case, then it's  
20 Giglio and will be disclosed to them. And if it's  
21 not, then it won't.

22 THE COURT: Well, I think I'll just leave  
23 the ruling where it is. He's heard your argument, so  
24 he can take that into account when he does his Brady  
25 review, Giglio review.



1           Somebody else was trying to stand up. I  
2   don't know if you -- all right. Maybe it's been  
3   addressed.

4           Ms. Sirignano.

5           MS. SIRIGNANO: Judge, my only addition to  
6   that would be that the Government has to prove the  
7   enterprise across both of these cases: 4268, 4269,  
8   and 1613. And many of these recent pleas in the  
9   factual basis of the plea includes statements  
10   regarding the enterprise. And we're not sure if the  
11   addenda have any other statements which would also --  
12   that they'd be relying on to prove the ongoing  
13   enterprise or the conspiracy. The introductory  
14   paragraphs in both indictments are identical. And so  
15   we would ask that if there is anyone that has pleaded  
16   thus far that will be used to prove the enterprise in  
17   these cases that their addenda get turned over to  
18   everybody.

19          THE COURT: All right. Be listening to  
20   these, Mr. Beck. You're hearing defense counsel make  
21   some pretty good arguments.

22          MR. BECK: I understand that argument, Your  
23   Honor.

24          THE COURT: All right. Ms. Fox-Young.

25          MS. FOX-YOUNG: Okay, Your Honor, the next

1 category of materials is on page 14, Subsection C.  
2 We ask for FBI 302s and law enforcement notes,  
3 specifically pertaining to Defendants Montoya,  
4 Armenta, and Martinez. I won't belabor the point for  
5 the Court. I've already argued that early statements  
6 were exculpatory to Mr. Perez, and I think the  
7 Government has conceded that later statements will  
8 either be Brady or Giglio, some combination. So for  
9 the same reasons we ask for any FBI 302s and/or law  
10 enforcement notes pertaining to the interviews and  
11 debriefs which have been given. Those debriefs were  
12 given just prior, we believe, to entry of these  
13 defendants' pleas. And we want notes and 302s  
14 pertinent to those debriefs, and debriefs given at  
15 any other time.

16 Although rule -- the Government knows, I  
17 think, that Rule 16 generally prohibits the  
18 disclosure of reports, memoranda, or other internal  
19 government documents, this Court has already noted in  
20 prior rulings that --

21 THE COURT: I guess I'm having a hard time.  
22 The first category that you -- that we went through,  
23 how is it different from this one?

24 MS. FOX-YOUNG: These, Your Honor -- rather  
25 than being the exact -- the actual statements.

1 THE COURT: Oh, the written or recordings.  
2 These are the 302s?

3 MS. FOX-YOUNG: These are the Government's  
4 302s, and/or any notes made by agents, which would  
5 reflect, of course, not only the statements, but  
6 impressions of those statements, and --

7 THE COURT: Can we just make my other  
8 ruling applicable to 302s and any notes?

9 MS. FOX-YOUNG: Yes, Your Honor, that's  
10 what we ask the Court to do.

11 THE COURT: Any objection to that, Mr.  
12 Beck?

13 MR. BECK: Well, I think the notes are  
14 Jencks. I think the Court has held that a number of  
15 times. I think the 302s -- I think they're Jencks  
16 also, but I understand the Court's position, and I  
17 think it's right, that they may also be, in this  
18 case, Giglio material.

19 THE COURT: Yeah, as long as you're  
20 reviewing them for Brady, but let's just put that in  
21 the same ruling that we did with the written and  
22 recordings of --

23 MR. BECK: No objection to that, Your  
24 Honor.

25 MS. FOX-YOUNG: And the second subpart,

1 Your Honor, we also ask for preservation of all rough  
2 interview notes made by law enforcement agents during  
3 interviews of any pretrial witnesses in the  
4 investigation of this case. So given the Court's  
5 ruling, I suppose the Government may produce some  
6 notes and not produce others. We cite the Lujan case  
7 from 2008, where Judge Brack granted that motion for  
8 preservation of notes, and ordered the Government  
9 review of the notes, and said that they might be  
10 subject to disclosure later.

11 I know the Government concedes that some  
12 notes may contain Brady or Giglio, and they argue  
13 some others may have impeachment value that's not  
14 evident until trial. That was exactly the case in  
15 Lujan, which is why the Court ordered them preserved.  
16 And we'd like the Court to do that in this case.

17 THE COURT: Any objection to that? All  
18 right. So no objection, I'll so order.

19 MS. FOX-YOUNG: Okay, Your Honor, so we  
20 move to our request for production of all recorded  
21 materials tagged into evidence in this case, and  
22 accessed by an expert to the original recorded  
23 materials.

24 As the Court knows, because the Court  
25 ordered that -- the evidence view happened on

1 December 2nd of last year for those counsel involved  
2 in Counts 6 and 7. That evidence viewing did happen  
3 in Las Cruces, and we were permitted to review the  
4 items that are listed on Exhibit 2 to our motion,  
5 which is an evidence inventory. Among those items  
6 were several discs, and I'd listed the numbers in  
7 this motion. We were not permitted to view what was  
8 on those discs. They're CDs that were labeled with  
9 evidence numbers. We don't know what's on them. So  
10 we've asked the Government by letter, March 20th of  
11 this year, to provide those materials, or give us  
12 Bates numbers if they have already been provided.

13 And I talked to Ms. Armijo a little bit  
14 over the break. I think the Government is trying to  
15 verify whether or not that evidence has actually been  
16 produced to the defendants. And I haven't had an  
17 answer on that yet. So maybe we take that subpart  
18 first.

19 THE COURT: Okay. Before I hear from you,  
20 Ms. Armijo, let me make sure I understand. So you  
21 went down there -- I remember the trip, because I set  
22 some conditions and those sort of things for it. And  
23 you saw these materials?

24 MS. FOX-YOUNG: We did. There are maybe  
25 100 items in evidence. I'm not looking at my --

1 THE COURT: Like the shanks and that sort  
2 of thing?

3 MS. FOX-YOUNG: Yeah, we saw all the  
4 physical evidence. Among the evidence that had been  
5 tagged in were CDs. There was no denotation on the  
6 CDs as to what digital material they contained. We  
7 were not permitted to pop those CDs into a computer  
8 or other device to see what's on them. We just want  
9 that evidence produced to us. And we don't know if  
10 it has been. And so we list it here.

11 THE COURT: All right.

12 MS. ARMIJO: Your Honor, I have emailed the  
13 case agent to see. We were not at that viewing, so  
14 it's kind of hard for us to know what it is. But I  
15 can tell you that we met with the case agent from the  
16 State Police months ago when Ms. Strickland was  
17 raising a bunch of issues, and we went over his  
18 personal file, which had everything in it. So I'm  
19 assuming it is, but I will double-check. And if it  
20 is not, we will disclose it. But since we weren't  
21 there, I don't know what it was. But we will  
22 disclose it, if it hasn't been disclosed. I'm  
23 assuming it has been, since we already did a check  
24 and had him bring his file and literally go over  
25 everything that we had with what was in his file.

1 THE COURT: Okay. So this was a particular  
2 guard, or whose file is this?

3 MS. ARMIJO: Well, the case was  
4 investigated by New Mexico State Police.

5 THE COURT: Okay.

6 MS. ARMIJO: And the New Mexico State  
7 Police case agent brought over his file several  
8 months ago, and we sat down and went over what we had  
9 with what he had. And we made copies of anything  
10 that he had that we didn't have. And we disclosed  
11 that.

12 These items were things that were at the  
13 viewing that we were not present at. I have emailed  
14 him to ask him if, in fact, we, the US Attorney's  
15 Office have it. If we don't, then I will certainly  
16 provide it to them.

17 THE COURT: In your production, did you  
18 produce some CDs that he had?

19 MS. ARMIJO: Yes.

20 THE COURT: Okay. Does that representation  
21 satisfy you, Ms. Fox-Young?

22 MS. FOX-YOUNG: Well, I just think the  
23 Court could really shortcut this. We've identified  
24 precisely the CDs that are tagged into evidence, that  
25 we haven't been able to see. All the Government

1 needs to do is burn them and provide us with copies.  
2 This has been going on for some time. We saw this  
3 evidence on December 2nd of last year. We've sent a  
4 letter to the Government. I think, if the Court will  
5 just order the Government to produce copies of these,  
6 we'll be done.

7 THE COURT: How many CDs are we talking  
8 about?

9 MS. FOX-YOUNG: About 10.

10 THE COURT: Well, do you want to go that  
11 way, or do you want to see if you already produced  
12 them?

13 MS. ARMIJO: I would prefer that we see if  
14 we've already produced them, so the next time we  
15 don't hear about 10 more CDs that are duplicates of  
16 others. Because this is how we keep on getting more  
17 and more duplicates of other things. It's just  
18 producing more and more discovery to be downloaded.

19 THE COURT: Well, any objection to me  
20 setting a deadline, say, respond within 10 days to  
21 this request, this letter?

22 MS. ARMIJO: If it has not been disclosed,  
23 New Mexico State has to give it to us, and that may  
24 cause a delay. I will get a response within 10 days,  
25 whether or not we believe we have. It's just a



1 matter of them getting it to us.

2 THE COURT: All right. Let's try to do  
3 this: Let's get a written response within 10 days.  
4 Then let's try to have the documents in the  
5 defendants' hands, if they don't already have them,  
6 within 14.

7 MS. FOX-YOUNG: And I would just ask,  
8 Judge, because these are materials tagged into  
9 evidence -- this isn't just any category of  
10 discovery -- if the Government comes back and says,  
11 We've produced this, I think the defense should be  
12 provided with Bates numbers as to where it is.  
13 Because discovery is really voluminous. These are  
14 items in evidence. We went to participate in an  
15 evidence view. We wanted to see what was on there,  
16 and we couldn't. So I think either production should  
17 be made, or information about prior production  
18 saying, This has been produced as Bates numbers X to  
19 Z, would be sufficient.

20 THE COURT: Agreeable with that, Ms.  
21 Armijo?

22 MR. BECK: That's fine.

23 THE COURT: All right. Okay. Ms.  
24 Fox-Young.

25 MS. FOX-YOUNG: Okay, Your Honor, we

1 further request that the Court order the Government  
2 to permit our expert to examine the original audio  
3 and video recordings in evidence, as well as the  
4 recording devices that were used to generate the  
5 recordings. And this is a request that's going to be  
6 broader -- and it comes up again in our motion --  
7 broader than just with respect to these items in  
8 evidence. I think you'll also hear Mr. Baca has a  
9 motion to compel which raises this.

10 And so, you know, it's our position, Your  
11 Honor, that our expert -- and we attach a declaration  
12 from Mr. Ray Carrillo as to why we need to have  
13 access to original audio and visual recordings. This  
14 is no different than an ordinary dope case, where the  
15 Court, upon defendant's motion, the Court would allow  
16 defendant to have his or her own expert test  
17 materials. It's a pretty routine process. And, you  
18 know, it comes down to the defense's ability to  
19 review and examine the evidence against the  
20 defendants, and it goes to our fair trial right.

21 So we're asking that Mr. Carrillo, with  
22 respect to this subcategory, be permitted to examine  
23 the recording devices that were used to generate  
24 these recordings. Mr. Carrillo's declaration -- I'll  
25 address this with more specificity when we get to

1 some other recordings -- but Mr. Carrillo's  
2 declaration provides the Court with a substantive  
3 basis for why it's necessary that an independent --  
4 that our defense expert be permitted to review them.  
5 So in this subpart I'm only talking about the  
6 evidence that the Court has already ordered be  
7 disclosed. We want access to the original audio and  
8 visual recordings, not just copies.

9 THE COURT: Let me make sure I understand  
10 the request. You're wanting him to look at the  
11 recording equipment?

12 MS. FOX-YOUNG: The original recordings  
13 and/or the recording equipment. The Government, I  
14 think, will say that there is no such thing as an  
15 original recording, because these are all digital  
16 files that just get cut from a recording device. In  
17 that case, this isn't like the old days, where you  
18 get a tape that looks like an old movie reel that you  
19 can examine. You need to examine the equipment to  
20 determine whether the copy that you have is complete,  
21 has not been altered, has not been edited, has not  
22 been stopped during the recording process. For all  
23 these reasons, and so that's why we asked for access  
24 to the original recordings, should they exist, and  
25 the recording equipment.

1           And we have no objection to having somebody  
2           there to preserve chain of custody. We don't want to  
3           in any way interfere with chain of custody. That's  
4           routinely done, like I said, in dope cases. But we  
5           need Mr. Carrillo to have access to those materials.

6           THE COURT: All right. Mr. Beck, are you  
7           responding on this one?

8           MR. BECK: Yes, Your Honor. So I heard  
9           this is no different than dope cases. And this is  
10          vastly different than dope cases. The recording  
11          devices are methods and means of law enforcement.  
12          And I don't think there is any basis. But if there  
13          was, the DOJ and the FBI would want to be heard on  
14          this issue.

15          Setting that aside, if we come in and play  
16          these tapes, what's required is that they're  
17          authenticated. And we know that requirement. We'll  
18          authenticate them, we have witnesses who will testify  
19          that that's what they heard. They're the ones who  
20          made the recordings. So there is no basis for  
21          testing or physically examining the recording  
22          devices.

23          The recordings themselves, I think Ms.  
24          Fox-Young is correct, they're just digital recording  
25          and a digital recorder, as far as I know. So the

1 defense team has access to those, and they can give  
2 them to their experts.

3 But in terms of, if we're looking at Rule  
4 16, and we're looking at material that may be that --  
5 may find -- I don't have the language in front of  
6 me -- but, basically, may lead to evidence in the  
7 case, there is nothing here that will lead to  
8 evidence by letting them look at these recording  
9 devices.

10 And, again, to the extent that there may  
11 be, the FBI and DOJ would certainly want to be heard  
12 on this issue. And I don't mean us as DOJ; I mean  
13 the big people.

14 So you have questions for me, I'm happy to  
15 answer them.

16 THE COURT: All right. Thank you, Mr.  
17 Beck.

18 I guess I do think this probably falls into  
19 sort of just general sort of discovery, a bit of  
20 fishing to see if anything turns up. It doesn't seem  
21 like there is any evidence that there is problem  
22 here. So I'd be inclined to deny this.

23 MS. FOX-YOUNG: Your Honor, I think it's  
24 best if we take it up down the road in number 3,  
25 which is coming up, because we do have some specific

1 findings. And I think with respect to this  
2 subcategory, you know, I can defer to the Court  
3 there, but I'd like to take it up in a few minutes.

4 THE COURT: Did you want to say something,  
5 Ms. Duncan, or do you want to take it up a little bit  
6 later?

7 MS. DUNCAN: Thank you, Your Honor. We  
8 have asked for the same thing in our recently filed  
9 motion to compel. So I think we can maybe argue on  
10 number 3 of Ms. Fox-Young's motion to add detail as  
11 to why we need access to those recording devices.

12 THE COURT: Okay.

13 MS. FOX-YOUNG: Thank you, Your Honor.

14 THE COURT: Ms. Fox-Young.

15 MS. FOX-YOUNG: The request for  
16 confirmation that the Government has no additional  
17 physical evidence over and above the evidence which  
18 is inventoried on exhibit -- I believe it's Exhibit 2  
19 to our motion, the evidence inventory from state  
20 police. And I have spoken to the Government to try  
21 to streamline this process over the break. In their  
22 response, the Government says that they are making  
23 inquiries to see if there is any physical evidence  
24 that the defendants in Counts 6 and 7 were not  
25 permitted to view, or have not been made aware of.

1 And I don't think they have an answer yet. And so  
2 we're still waiting for an answer. So I think that  
3 request still stands.

4 Secondly, in this category, we asked for  
5 permission to handle the physical evidence in Counts  
6 6 and 7.

7 THE COURT: Why don't we take up the first  
8 part first. Then we'll come back to the second  
9 request.

10 Mr. Beck? Ms. Armijo, are you arguing this  
11 one?

12 MS. ARMIJO: Your Honor, I have sent out,  
13 and I will verify and let them know if there is  
14 anything they didn't see. Again, since we weren't  
15 there, I don't know what they saw or not, or if there  
16 is anything else on the sheet. So I will check into  
17 that. I have checked into it, but I'm just waiting  
18 for confirmation, and trying to figure out what they  
19 saw and what they didn't. Because I don't want to  
20 make promises since we weren't there.

21 THE COURT: All right. What I propose to  
22 do on this one, if this would be acceptable: Within  
23 10 days, if you do not receive a response, that it  
24 will be deemed that the Government has represented  
25 that all the evidence they have is on the inventory

1 list. Does that work for you?

2 MS. FOX-YOUNG: Yes, Your Honor.

3 MS. ARMIJO: And just so that we're clear,  
4 all the evidence from the crime scene -- I mean, we  
5 may have other recordings and things that were  
6 post-investigation. But I believe this deals with  
7 the inventory list from the crime scene with New  
8 Mexico State Police.

9 THE COURT: All right.

10 MS. ARMIJO: That's the specific request.

11 THE COURT: Can you live with that gloss?

12 MS. FOX-YOUNG: I think so, Your Honor.

13 Let me just confer real briefly with my co-counsel.

14 THE COURT: Certainly.

15 MS. FOX-YOUNG: Your Honor, I think we can  
16 live with that, so long as only outstanding physical  
17 evidence would be in the category of recordings. I  
18 mean, we set up an evidence view last year in order  
19 to view the physical evidence. We're trying to, you  
20 know, litigate this case, and proceed along the  
21 Court's deadlines. So we really need to know if  
22 there is any other physical evidence. We understand  
23 that post-incident there continue to be recordings  
24 made. But if the Court will limit the Government, as  
25 the Court described, with the caveat that there may



1 be recordings, that's something I can live with.

2 THE COURT: Can you live with that, Ms.  
3 Armijo?

4 MS. ARMIJO: The thing that I can think of  
5 it is, what if we have somebody involved in this case  
6 that's able to come up with the photograph -- not of  
7 the murder itself, but something that is of a  
8 relationship between Mr. Perez and SNM, and says,  
9 yes, we were good friends -- I'm just using this as a  
10 an example -- and so that would be physical evidence,  
11 it would be a photograph that we didn't have, because  
12 it's not from the crime scene, it's not a recording.  
13 So I'm not trying to be vague. But I don't want to  
14 cut off the possibility that there might be something  
15 out there. I don't believe there is anything out  
16 there. I believe it's all recordings and the crime  
17 scene. So we will give her an answer as to that.  
18 And certainly, if anything else crops up, we would  
19 certainly alert them.

20 THE COURT: All right. I think I'll just  
21 make a ruling: In 10 days, if you don't receive,  
22 then it's that. If something pops up that's not in  
23 the Government's possession, and they get hold of it,  
24 then we'll deal with it at that time. I'm not  
25 excluding any evidence at this point. So if the

1 Government -- it comes into their hands afterwards,  
2 then we can deal with that. That often happens  
3 before trial, somebody thinks of something they have  
4 somewhere else. So we'll certainly allow for that.  
5 But I think within 10 days, we'll either have a  
6 letter from the Government or treat it as a  
7 representation, with the gloss that you put on it,  
8 Ms. Fox-Young.

9 So the next thing is you want to now ask to  
10 relook at that evidence? Or what is the second  
11 portion of your request?

12 MS. FOX-YOUNG: The second portion of our  
13 request is we've asked the Government for permission  
14 for -- permission to handle the physical evidence.  
15 It's our understanding that some other defendants --  
16 for the Court's information some other counsel at  
17 evidence viewing have been permitted to handle the  
18 physical evidence. We need to do that as part of our  
19 investigation. The Government responded to us by  
20 saying, you know, we need to know exactly what  
21 evidence you want to handle and why. We say that's  
22 work product.

23 If the Court wants to take that up, we're  
24 happy to provide the Court with this information.  
25 But we don't think we should be required to provide

1 it to the Government. But we can provide the Court  
2 with a particular list of exactly what we want to  
3 look at.

4 Again, we have no objection to a records  
5 custodian being present, somebody to maintain chain  
6 of custody. And, you know, this is done fairly  
7 routinely in other kinds of cases where there is an  
8 examination or testing of evidence. We should be  
9 permitted to do more than just look at it.

10 THE COURT: Ms. Armijo.

11 MS. ARMIJO: Your Honor, and the problem is  
12 that the Government and the case agents aren't there,  
13 so you have somebody that doesn't know anything about  
14 the case. And if you have something like a piece of  
15 clothing that has a lot of blood, what are they going  
16 to do to it? How do they want to handle it? Do they  
17 want to open it up? Are they going to contaminate  
18 it? What if we want to do further testing? What if  
19 we arrest somebody else and do it? So I'm just  
20 concerned with what the evidence item is. If there  
21 is something that there probably won't be any further  
22 testing on, then probably we wouldn't have an  
23 objection. But if it's something that's very  
24 fragile, or could be tested, or toxic, then we might  
25 have an issue with it.

1 THE COURT: Let's do this: Let me grant  
2 the defendants' request. You can have somebody  
3 there, and I'll give that person veto power. So if  
4 they say, No, you can't touch that, that's -- we're  
5 going to retest that, or it's got blood on it,  
6 they'll be able to veto it. And then you can bring  
7 it back to me. If the review goes on without a  
8 hitch, we'll just keep moving. But that will give  
9 you the veto power. But it will keep it moving. And  
10 chances are most of it you'll get to see and touch,  
11 and maybe all of it.

12 MS. FOX-YOUNG: Your Honor, as we asked in  
13 our previous evidence view, we'd ask that that person  
14 or persons not be members of the prosecution team. I  
15 mean, these are state police detectives and agents  
16 who handle evidence all the time. The Government  
17 can, I think, accomplish protecting chain of custody  
18 and preserving the evidence properly without having  
19 somebody on the prosecution team there.

20 THE COURT: I think you can put somebody  
21 that's a state police evidence person in there,  
22 somebody that knows how to handle evidence. But it  
23 shouldn't be somebody that's going to be a witness in  
24 the case, and not part of your team. But you can put  
25 somebody in there that's knowledgeable. You don't

1 have to put an ignorant person in there. You can put  
2 somebody in there that knows what they're doing, and  
3 say, "Don't touch that."

4 MS. FOX-YOUNG: Judge, we prefer not to  
5 have an ignorant person.

6 THE COURT: A what?

7 MS. FOX-YOUNG: We'd prefer not to have an  
8 ignorant person.

9 THE COURT: It's always good, isn't it?

10 All right. Ms. Fox-Young.

11 MS. FOX-YOUNG: All right. Your Honor, the  
12 next category: We asked for locations where the  
13 recordings produced in discovery, entitled, "Audio of  
14 body recording of CHS and R. Perez." And I list a  
15 number through another number that were recorded.  
16 There are a number of recordings. And, Your Honor,  
17 we're getting into categories of evidence that, as I  
18 indicated in the beginning of the argument, go to the  
19 voluntariness of Mr. Perez' statements, which is  
20 always an issue at trial, and go directly to evidence  
21 that is material -- will be material to our arguments  
22 in our motion to suppress, go directly to the  
23 voluntariness of these statements, and the  
24 circumstances surrounding these statements.

25 So first, we ask for the location where

1 they were made. And the reason for that, as we note  
2 in our brief, is that we believe these recordings  
3 were made while Rudy Perez was at PNM Level 6. As  
4 the Court knows, this is the highest level of  
5 segregation in the New Mexico Department of  
6 Corrections. Without giving it a particular moniker,  
7 it's essentially solitary confinement. Mr. Perez was  
8 held there without any disciplinary process or  
9 hearing for months. And his health was severely  
10 compromised during that time.

11 And so, Your Honor. We're going to argue  
12 that the Government really fostered these conditions  
13 for a number of reasons, in a number of ways, and  
14 took advantage of these conditions, placing an  
15 informant next to Mr. Perez to question him about the  
16 circumstances surrounding the Molina murder. And  
17 that is how we believe these recordings were  
18 generated. And so the location where they were made,  
19 if, in fact, they were made in solitary confinement,  
20 will be critical to this Court's determination as to  
21 whether they were made voluntarily, and in  
22 considering whether or not they should be suppressed.

23 Beyond that, Your Honor, it will be  
24 critical, if the statements are not suppressed, to a  
25 jury's determination as to whether they were made

1 voluntarily. So this is absolutely material. And we  
2 need to know this in order to proceed on whatever the  
3 Court's timeline will be for substantive motions in  
4 the 4268 case, because it goes directly to issues  
5 surrounding suppression.

6 THE COURT: When you say "location," are  
7 you talking about where the wire was? What are we  
8 talking about?

9 MS. FOX-YOUNG: It's hard to know without  
10 knowing precisely the location. But presuming these  
11 recordings were made in PNM Level 6, we want to know  
12 which cells in PNM Level 6 they were made in. Not  
13 location of the wire on the person's body, but where  
14 our client was, and where the recording was made at  
15 the time.

16 THE COURT: When you say "where the  
17 recording was made," are you talking about where the  
18 recording device was located?

19 MS. FOX-YOUNG: We don't need to know where  
20 the device was located and in that way compromise any  
21 government investigated tools or tactics. We need to  
22 know where our client was.

23 THE COURT: Is that really what you need is  
24 just to know what cell he was in?

25 MS. FOX-YOUNG: And you'll see, Your Honor,

1 as we go through these, we ask that the Court order  
2 the Government to produce a number of -- sort of a  
3 wide variety of information surrounding the  
4 circumstances of these recordings. But, yes, we need  
5 to know if he was in Level 6, if he was in solitary  
6 confinement at the time that the Government planted  
7 an informant next to him. And that is because -- and  
8 we get to this in later briefing -- the Court, I'm  
9 sure, is familiar with the Fulminante case that talks  
10 about exclusion -- a Supreme Court case, 499 U.S.  
11 279, says -- essentially, boiling it down, that  
12 statements to cooperators can be suppressed under  
13 certain circumstances.

14 We need to know what the circumstances  
15 were. If Mr. Perez was sitting in an open pod, you  
16 know, in a camp somewhere, it would be a different  
17 circumstance for the Court to consider, than if he's  
18 in solitary confinement, and has been in solitary  
19 confinement for some time, when the Government places  
20 an informant next to him and does a series of other  
21 things to effectuate making these alleged statements  
22 or generating, extracting these statements.

23 And so I say the location would be the  
24 facility, and the location within the facility, and  
25 the cell.



1 THE COURT: Okay. So the facility, and the  
2 location within the facility of the cell.

3 MS. FOX-YOUNG: And the cell where the  
4 informant was located.

5 THE COURT: So they're recording  
6 conversations -- I mean, I haven't heard these tapes.  
7 These are two gentleman talking to each other; is  
8 that what -- and they're recording it?

9 MS. FOX-YOUNG: Yes, Your Honor.

10 THE COURT: All right. Mr. Beck, are you  
11 going to respond on this?

12 MR. BECK: Yeah. Again, it's getting well  
13 beyond the scope of criminal discovery. So I'm  
14 looking at Rule 16 here, and I'm trying to even  
15 figure out where there is an obligation to disclose  
16 locations of recordings and locations in cells. It's  
17 pretty clear -- when you disclose documents and  
18 objects, reports, examinations and tests, it's clear  
19 what's required. And that doesn't fall in there.

20 So I understand that it would be nice to  
21 have this information. They can ask their client  
22 where he was. The criminal rules don't require us to  
23 provide that. And so the Court shouldn't either.

24 And the fact is -- I mean, we can talk  
25 about how they want to use this down the road for

1 motions to suppress, and they can investigate, and  
2 they can find those things out, and get the facts  
3 from their client and from elsewhere, and use those  
4 for a motion to suppress. But that's distinct from  
5 the Government's obligation to present materials,  
6 documents, objects under Rule 16, which is not here.

7 And, I mean, they can argue about the  
8 voluntariness and the way the Government set that up.  
9 But Mr. Perez wasn't even on the radar until we got  
10 these recordings back, and he admitted the thing. We  
11 didn't even know who he was, so --

12 THE COURT: Are these recordings that  
13 you're going to use at the trial?

14 MR. BECK: We may. We may just have the  
15 informant testify. But we may use them. My  
16 understanding -- I've listened to them -- is they're  
17 not extremely clear. I don't think anyone states  
18 that. But we may use them.

19 THE COURT: So you would use them with the  
20 informant? The informant would testify and  
21 authenticate the recording?

22 MR. BECK: Well, I think the recording has  
23 to be authenticated. If it's going to be used in our  
24 case-in-chief, it has to be authenticated. So --

25 THE COURT: So who would authenticate it is

1 the informant?

2 MR. BECK: I can't really think of who else  
3 would.

4 THE COURT: And is that person going to  
5 know the information that Ms. Fox-Young is asking  
6 about? They certainly would know where they were,  
7 right?

8 MR. BECK: I don't know. I would assume  
9 so. I mean, from what I've witnessed and what I've  
10 seen in this case, these gentleman have very, very  
11 good memories of where they were and when they were  
12 there. So my expectation would be that he would  
13 remember those things. But I don't know.

14 THE COURT: Does the Government keep a log  
15 similar -- that has the information that the  
16 defendants are seeking? I mean, is that the way they  
17 do it: Say this person was here, this person was  
18 there at this particular time?

19 MR. BECK: I don't know.

20 THE COURT: I've read lots of transcripts,  
21 and I'm not sure I've seen --

22 MR. BECK: I don't think I have either.

23 THE COURT: -- that document.

24 Right, Ms. Fox-Young? I mean, it seems to  
25 me that we may be requiring the Government to go

1     invent a document. It's kind of like an  
2     interrogatory. You're asking them -- you send over  
3     an interrogatory asking for some information, but I'm  
4     not sure that they're required to produce something  
5     that doesn't exist.

6             MS. FOX-YOUNG: Well, I think, Your Honor,  
7     there has to be something that exists that shows  
8     where Mr. Perez was in PNM Level 6 at the time of the  
9     recordings. And I think the Court was going right to  
10    the heart of the issue under Rule 16.

11            I mean, I can give the Court more to sink  
12    its teeth into with regard to why this material is  
13    material to us. You know, we don't know what day the  
14    recordings were made. And so our client can't tell  
15    us precisely where he was, to the extent that he  
16    would remember.

17            THE COURT: I thought most of the  
18    recordings have a date.

19            MS. FOX-YOUNG: No, that's redacted from  
20    the transcripts. We don't know the date. I mean,  
21    the Court could order the Government to disclose the  
22    date.

23            Beyond that, we want the jury to see these  
24    cells. We want the jury to understand. And in  
25    preparing for a trial, we need to understand what the

1 conditions were like for our client in solitary  
2 confinement at the time that these statements were  
3 allegedly made.

4 The Government knows this. I understand  
5 that the Court is not inclined to order the  
6 Government to produce a document that doesn't exist.  
7 But we're just asking the Government to confirm  
8 whether or not our client was in solitary confinement  
9 at the time they put an informant next to him.

10 THE COURT: But aren't you going to get  
11 that information at the suppression hearing, when  
12 they put the informant on, to introduce the tape?

13 MS. FOX-YOUNG: Yes, Your Honor. If the  
14 Court grants us a hearing, we will get that  
15 information then. Of course, we can't -- between now  
16 and that time, we can't investigate any further what  
17 these circumstances were precisely.

18 And so, you know, under Graham -- we cite  
19 United States v. Graham in our description of what is  
20 producible, needs to be produced under Rule 16. I  
21 mean, clearly this information plays an important  
22 role in uncovering other admissible evidence with  
23 respect to Mr. Perez, and what he was going through  
24 at that time. If we can confirm where he was, then  
25 we know what the -- we know something more about the

1 circumstances surrounding these statements -- will  
2 help us in witness preparation for a hearing on a  
3 motion to suppress, and potentially assist in  
4 impeachment or rebuttal. All we need show, Your  
5 Honor, is that this information could alter the  
6 quantum of proof in Mr. Perez' favor.

7 And so given -- you know, given these  
8 issues surrounding suppression, you know, we think  
9 it's easy for the Government to tell us where the  
10 recordings were made and when they were made.

11 THE COURT: Why are you redacting out the  
12 dates?

13 MR. BECK: I don't know. I can't think of  
14 a transcript in which the date is redacted. If there  
15 is one, I'm happy to look at it. I don't know that  
16 we do that.

17 THE COURT: All right. If there is  
18 redacted date, would you be willing to produce the  
19 date?

20 MR. BECK: Yes.

21 THE COURT: Okay. I think I'm going to  
22 leave it there. If you get the dates, talk to your  
23 client. We'll probably have a suppression hearing.  
24 They've got to put somebody on the stand. You're  
25 probably going to get all the information, rather

1     than having them prepare a document or prepare a  
2     letter, or something like that, that requires them to  
3     go get the information. So I think I'll just leave  
4     it there. So that, I'll deny.

5             MS. FOX-YOUNG: Okay. Your Honor, may I  
6     make one additional point on that?

7             THE COURT: You may.

8             MS. FOX-YOUNG: We think it's very  
9     important for the Court also, in making a  
10    determination about voluntariness of these  
11    statements, the Court needs to know what the cells  
12    looked like, what the layout was, what sort of  
13    deprivations existed, if, in fact, Mr. Perez was in  
14    Level 6. And we won't be able to work any of that up  
15    prior to filing a motion to suppress or prior to a  
16    suppression hearing, if we don't know where the  
17    recordings were made. We won't be able to do that  
18    additional investigation, and the Court will not have  
19    the benefit of that information.

20            THE COURT: Well, but why not? I mean,  
21    Mr. Perez can give you the -- where he was at. He  
22    may not know that day he was in that cell. But you  
23    can show me a picture or video or something from  
24    that, can't you?

25            MS. FOX-YOUNG: Okay, Your Honor. I'll

1 move on. I understand the Court's ruling.

2 The next category -- I didn't know, Your  
3 Honor, if -- I guess we're not yet to what Ms. Duncan  
4 wants to argue on.

5 The next category, we asked for any and all  
6 transcripts of the recordings. The Government -- I  
7 talked to Ms. Armijo during the break -- the  
8 Government submits that, I believe, eight recordings  
9 were actually produced after the -- close to the time  
10 of the filing of this motion. And I think that it's  
11 the Government's representation that that is all the  
12 recordings. If the Government will say that on the  
13 record, and in fact, all of the transcripts have been  
14 produced, then we don't need to argue this.

15 THE COURT: Ms. Armijo?

16 MS. ARMIJO: Your Honor, I believe we have  
17 disclosed all of the recordings. And we disclosed  
18 the transcripts that we have. There is eight. I  
19 will confirm there are no other outstanding  
20 transcripts that are coming in. And I'm not  
21 representing that we have disclosed -- that we have  
22 transcribed every call. But I believe this motion  
23 said that we have not disclosed any transcripts, and  
24 I showed her that, in fact, that we have disclosed  
25 eight transcripts on March 10, which is 21 days



1 before this motion was filed. So I will verify and  
2 get back and provide, within ten days, what is  
3 outstanding. But I don't believe we have anything  
4 outstanding, Your Honor.

5 THE COURT: All right. Does that work for  
6 you, Ms. Fox-Young?

7 MS. FOX-YOUNG: Yes, Your Honor, it does.

8 THE COURT: Ms. Fox-Young.

9 MS. FOX-YOUNG: Okay, the next category  
10 consists of all complete recordings; if, in fact, any  
11 were edited. And I'm talking about these recordings  
12 made of Mr. Perez at -- what the Government says was  
13 in sometime in February of 2016. The Government has  
14 represented that the recordings have not been edited  
15 in any way. We have some questions about that.

16 And this, Your Honor, is where our -- the  
17 declaration from our expert, which is attached to the  
18 motion as Exhibit 3 -- it's a declaration of Raymond  
19 Carrillo. Mr. Carrillo is a certified forensic  
20 technician. He has over 16 years of experience  
21 looking at tape transfers and duplications, this sort  
22 of data.

23 In his review of the audio recordings -- he  
24 reviewed 11 of the audio recordings referenced here.  
25 Subsequent to his review, he determined that these

1 recordings are all different sizes and lengths. He  
2 seamed them together into a timeline to determine  
3 whether they were cleanly cut into segments, or if  
4 they were actually the product of a recorder that had  
5 been stopped or paused, whether the informant was  
6 stopping the recording, and continuing with  
7 conversation that was not recorded, and, therefore,  
8 produced.

9 It's his finding that segments were not  
10 cleanly cut, indicating that there may have been  
11 stopping or pausing. He finds that there is a  
12 possible loss of information between recorded  
13 segments, meaning there is information that was not  
14 picked up. Essentially, statements of Mr. Perez, or  
15 of the informant that was not recorded and was not  
16 produced.

17 But in order to make any kind of definitive  
18 determination about whether that happened, for,  
19 instance, he's got to examine the original  
20 recordings -- which the Government says don't  
21 exist -- and the recording equipment used to make  
22 them, to find out if there is a loss of information.

23 And his declaration details -- unless the  
24 Court wants me to, I won't get into all the technical  
25 details about file length and differences in

1 resolution. But that is part of the basis for this  
2 request.

3 And so, again, because the content of the  
4 original unedited recordings, and the content of what  
5 might not be on the recordings, if the informant was  
6 selectively recording material, taking material out  
7 of context, is highly relevant to this Court's  
8 determination about the voluntariness of any  
9 statements that are heard on the recordings.

10 And so, in order for us to prepare,  
11 investigate, and do any kind of critical analysis of  
12 this discovery and this evidence, we have to have  
13 access either to the original recordings, and/or to  
14 the recording equipment itself. And as I said, this  
15 is an issue the Court's going to have to deal with.  
16 We have a lot of recordings in this case.

17 And the analysis may be different with  
18 respect to different recordings. Here, we posit it  
19 goes directly to the voluntariness of these  
20 statements and the circumstances surrounding the  
21 statements.

22 Because our client says, "He said things  
23 before and after," and he was enticed, or he was  
24 threatened, or he was coerced in some way. We can't  
25 investigate that with respect to what the Government

1 recorded without that access.

2 THE COURT: But is he saying that?

3 MS. FOX-YOUNG: Well, at suppression, we're  
4 going to argue that these were coerced statements;  
5 that they weren't voluntary, under Fulminante and a  
6 number of other cases.

7 And the way that he was recorded, and what  
8 was not recorded goes directly to the Court's  
9 analysis there. I mean, if the informant is turning  
10 the reporting device off, because there is  
11 exculpatory information, or because he is taking time  
12 to coerce Mr. Perez into saying something, you know,  
13 we're entitled to investigate that under Rule 16,  
14 under Brady, and it goes directly to suppression.

15 THE COURT: But I guess I don't understand  
16 how the equipment or the original tape would help you  
17 there. If he's not turning it on, then that's a  
18 different problem, isn't it?

19 MS. FOX-YOUNG: Well, that's one thing that  
20 could -- that our expert in his declaration, which is  
21 Document 1037-3, says he -- access to the original  
22 equipment will allow him to investigate. And so that  
23 is one possible, and maybe actually likely aspect or  
24 characteristic of these recordings; that there is  
25 evidence that an expert can determine the recordings

1     were -- this is not one seamless recording of a  
2     conversation, you know, that went on for a period of  
3     30 minutes. It is selective. It has been edited,  
4     and/or the recorder has been stopped. And there are  
5     reasons for that, and those reasons go to our  
6     arguments at suppression.

7             So I'm just not pulling this out of thin  
8     air, Judge. We have Mr. Carrillo saying in this  
9     declaration precisely why he needs access to the  
10    original files, in order to make a determination  
11    about that. And, you know, we're entitled to put an  
12    expert on to say, "This recording was stopped. This  
13    recording is not complete." What happened in the  
14    interval when the recorder was turned off?

15            THE COURT: Can't he do that already? I  
16    mean, if that's what he's saying in his declaration,  
17    don't you have everything you're going to get? I  
18    mean, just because it was turned on, turned off, we  
19    always are left to wonder what occurred before and  
20    what occurred afterwards. Isn't your expert able to  
21    say that now, as well as after reviewing the  
22    equipment?

23            MS. FOX-YOUNG: Your Honor, what he can  
24    only, to some degree, speculate about at this point,  
25    without access to the recording equipment, is whether

1 or not it was done. It's his declaration that, if he  
2 is able to review the equipment and the originals, he  
3 can say whether or not this was one continuous  
4 conversation --

5 THE COURT: We know it wasn't, right? We  
6 just know it's not.

7 MS. FOX-YOUNG: That appears to be the  
8 case. But what we can't tell is whether there was  
9 information lost between the segments, or whether it  
10 was momentary. I mean, without gaining that access,  
11 we don't know precisely what will be discovered. But  
12 we know that there is reasons -- it's not as if this  
13 is one seamless recording, and I'd be standing before  
14 the Court saying, you know, we just would like to see  
15 the recording device, because, you know, we think  
16 maybe there is some possibility it was stopped.

17 We have an expert saying there may be  
18 information loss. And I can't say, without reviewing  
19 the equipment, whether or not there is. But there  
20 are indicators that there is information loss, which  
21 goes to the arguments I've already proffered.

22 THE COURT: All right. Thank you, Ms.  
23 Fox-Young.

24 The Government?

25 MR. BECK: Your Honor, I think this

1 falls --

2 THE COURT: This is the one where Ms.  
3 Duncan wanted to be heard on it. So why don't --  
4 before you respond, why don't I hear what she has to  
5 say. Ms. Duncan?

6 MS. DUNCAN: Thank you, Your Honor.

7 Your Honor, we made the same request in our  
8 motion to compel, which is Document 1053. And we  
9 adopt all of Mr. Perez' arguments. But I also wanted  
10 to make some points that are specific to Mr. Baca.  
11 So, like Mr. Perez, Mr. Baca was recorded at PNM  
12 Level 6 by an informant in this case. There is a lot  
13 of recordings. And these recordings stop -- they  
14 start and they stop mid conversation. The way that  
15 the recordings are started and stopped is misleading.  
16 And we believe -- have reason to believe that  
17 exculpatory information has been excluded. We're  
18 very concerned, because with respect to Counts 9 and  
19 10, the Government's evidence is really these  
20 recordings. So whether they're a fair and accurate  
21 representation of the conversations is critical to  
22 the jury's determination of innocence or guilt at  
23 trial.

24 So what we are asking for is to review  
25 these recorders, to have an expert review these

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1     recorders to determine, is the way in which these  
2     recordings were made, the starting and the stopping,  
3     was that a decision by the recorder, so the  
4     informant? Was it a malfunction? Is there some  
5     other, you know, thing going on with the recorder  
6     that would cause the segments to create these  
7     segments that have been disclosed in discovery? Were  
8     they edited? Is there evidence that a recording was  
9     being made, it was then deleted, restarted, that sort  
10    of thing?

11               Because from the conversations, there are  
12    few recordings that really start at the very  
13    beginning of the conversation. And with the  
14    informant who is most relevant to Mr. Baca, he's not  
15    only recording with one of these devices, but he also  
16    had a cellphone. And so sometimes these recordings  
17    are picking up a cellphone, they're picking up  
18    conversations between cells. And it's just unclear  
19    if these recordings are accurate. So what you'll  
20    have happen is like there is some sort of  
21    conversation going on, the recording suddenly starts,  
22    and then you'll have this informant summarizing his  
23    understanding, or what he would like the Government  
24    to believe happened before the recording comes on.  
25    And because of the way that it's recorded, sometimes



1 you can't hear the other side. So you can't hear Mr.  
2 Baca, you can only hear the informant.

3 So looking at the recording devices is  
4 necessary for us to impeach this person who is going  
5 to testify at trial, to the extent that he says that  
6 these are fair and accurate, or that he wasn't in  
7 control of how they're being recorded or how they're  
8 being disclosed.

9 So this is really important evidence for  
10 Mr. Baca, particularly, as to Count 9 and 10.

11 THE COURT: All right. Thank you, Ms.  
12 Duncan.

13 Mr. Beck?

14 MR. BECK: Again, Your Honor, I think this  
15 goes beyond what the rules or any other authority  
16 provides the United States must disclose. And what I  
17 get from the declaration of Mr. Carrillo, and from  
18 argument of counsel, is they want to know if these  
19 were turned off and on, or if they're one recording.

20 They're not one recording. And then, I  
21 guess, he says that "further assess whether there was  
22 a loss of information between segments." And, yes,  
23 there was a loss of information between segments,  
24 because there was no recording.

25 And so then you go -- I mean, that's

1 information they can explore on cross-examination  
2 with the authenticating witness, is why did you stop  
3 recording, or why did the recorder stop recording?  
4 Or if you leave out -- I mean, that's all fair  
5 argument and fair cross-examination. But it doesn't  
6 lead to any need to see these recording devices and  
7 see whether there is an on or an off switch.

8 THE COURT: How is this done? How are  
9 these recordings done? You said it's done digitally,  
10 so it's not put on a disc immediately. It's just put  
11 on the recording machine, and then you go in and you  
12 download it onto a CD? Is that the way it's done?

13 MR. BECK: I mean, I'm by no means an  
14 expert. But, yes, it records a digital file. Then  
15 the digital file is at some point downloaded, and it  
16 appears here in MP3 format.

17 THE COURT: Can the Government make this  
18 representation: Can it make the representation that  
19 everything that is on the machine is on the CD that's  
20 been produced to the defendant?

21 MR. BECK: Well, I think we can make the  
22 representation -- I'm hearing, yes. I think maybe  
23 the more accurate representation would be  
24 everything -- I mean --

25 (The Government conferred.)

1 MR. BECK: Yes. Everything on the recorder  
2 is downloaded and went out, so, yes.

3 THE COURT: So the Government is able to  
4 represent that there has been no editing?

5 MR. BECK: No. So I believe that we  
6 produce enhanced recordings, but also produced the  
7 original of the recordings that we've enhanced.

8 THE COURT: So you gave them an enhanced  
9 and an original?

10 MR. BECK: Right.

11 THE COURT: But there has been no editing?  
12 You can assure the Court that nothing has been cut  
13 out in any way?

14 MR. BECK: Right. Not by the Government.

15 THE COURT: They got everything that's on  
16 the machine?

17 MR. BECK: Right.

18 THE COURT: All right. Ms. Fox-Young?

19 MS. FOX-YOUNG: Well, Your Honor, I think  
20 it's one thing for Mr. Beck to proffer to the Court  
21 that everything that was recorded has been downloaded  
22 and produced. But without having our own expert  
23 review the recording equipment and the recordings, we  
24 can't tell. And Mr. Beck has told the Court he  
25 doesn't personally do this. This is exactly why you

1 have an expert in a situation like this. It's sort  
2 of involved technical work. And I just -- I don't  
3 think that it's sufficient for the Government to say:  
4 We promise we have produced everything and it's not  
5 edited. So that's the first point.

6 The second point is, as I've already argued  
7 to the Court, we need to know more, and can tell more  
8 from the recording equipment itself about, exactly as  
9 Ms. Duncan argued, whether the recorder, whether the  
10 informant was controlling the recorder, turning it on  
11 and off; whether the informant was making a  
12 determination about when to start it, and, therefore,  
13 what was left out. And that all goes to the  
14 voluntariness of Mr. Perez' statements.

15 So the Government -- I mean, I appreciate  
16 the Government confirming that everything has been  
17 produced. But it still doesn't answer those  
18 questions, which we need to investigate in order to  
19 properly cross-examine whoever authenticates these  
20 recordings at a suppression hearing or at trial.

21 THE COURT: Do you want to say -- have a  
22 final word on this, Ms. Duncan?

23 MS. DUNCAN: Yes, Your Honor. I have a few  
24 points.

25 THE COURT: Ms. Duncan.

1 MS. DUNCAN: Your Honor, we're not arguing  
2 sort of the bad faith of the Government, that they  
3 failed to download the recordings from the devices.

4 THE COURT: Well, it's worse, isn't it? I  
5 mean, you're saying they doctored the tape, isn't it?

6 MS. DUNCAN: I don't know. I actually --  
7 my inquiry is targeted much more at the confidential  
8 informant. But at this point, I just need more  
9 information.

10 THE COURT: The CI is not going to record  
11 the material. He's just the person that's at the  
12 other end that they're recording the conversation;  
13 correct?

14 MS. DUNCAN: No, I believe that the CI had  
15 control over the recorder, and so was hitting the  
16 button, or stopping the button, I think. And my  
17 concern is -- so, one, I just want to know, is that  
18 true? So the recordings that I have, are they all  
19 the recordings, and was it the CI's decision to start  
20 conversations mid conversation, and to create  
21 recordings that I think are inaccurate, and don't  
22 fairly reflect the content of the conversation. But  
23 without looking at the devices, I can't know that.

24 And there are a couple of reasons why I'm  
25 concerned about just accepting the Government's

1 representations without having an expert look at the  
2 device. One is that there have been other electronic  
3 devices, like cellphones, where the Government has  
4 downloaded the information, but we haven't gotten all  
5 of the information off the cellphones. And so now  
6 the Government has agreed that we can look at them.  
7 So I can't tell the Court what exactly is missing.  
8 But I should be able to, once we've been able to look  
9 at those cellphones.

10 Secondly, in discovery -- and this is Bates  
11 No. 21822. It's a 302 that's talking about a dispute  
12 between two informants of whether or not a  
13 conversation ever took place. And Agent Acee went  
14 back to look at the recordings that they had  
15 retrieved from one of the informants, and it wasn't  
16 there. And what the report says, "In an effort to  
17 track down the recording, Agent Acee conducted a  
18 review of redacted file, and spoke with Special Agent  
19 Brusuelas. No recording was located in the source's  
20 file, although the source said that he had recorded  
21 this conversation. Agent Brusuelas recalled that the  
22 CHS had been equipped with a covert recording device,  
23 and had been tasked with recording SNM members.  
24 Agent Brusuelas subsequently collected the recording  
25 device from the source. However, the device failed

1 to record conversations. And the agent thought the  
2 device had malfunctioned or been damaged."

3 So one of the reasons why we're asking for  
4 access to these devices is our expert can make an  
5 independent determination of whether, in fact, these  
6 devices had malfunctioned or been damaged; whether,  
7 in fact, when the Government downloaded recordings  
8 from these devices, those downloads were complete.

9 So that is why we're asking. Because these  
10 conversations are so critical to the Government's  
11 cases against Mr. Baca and against Mr. Perez, it's  
12 important that we have access to the recording  
13 devices to make these kind of factual determinations,  
14 which will be relevant not only for motions to  
15 suppress, but also in the jury determining the  
16 credibility of the Government's witnesses.

17 THE COURT: Mr. Beck, can you answer this  
18 question? I mean, is the picture that Ms. Duncan has  
19 given me is that the informant is, like, in the cell  
20 next door, and he's got a recording device, and he's  
21 turning it on and off? Is that what's going on? Or  
22 is this more like the wiretaps that I'm used to  
23 seeing, where you've got people at an undisclosed  
24 location listening to a device?

25 MR. BECK: Yes.

1 THE COURT: It's both?

2 MR. BECK: No, you asked whether I can  
3 answer that question.

4 THE COURT: Oh, okay. Will you?

5 MR. BECK: I will. It's the former. It's  
6 a device with an on and an off switch.

7 THE COURT: Okay. So everything that the  
8 informant -- so the informant could be cutting things  
9 off early and starting it later. But everything that  
10 you got, you've produced?

11 MR. BECK: I agree with the second part of  
12 that. I guess the first part --

13 THE COURT: Don't you have everything you  
14 need?

15 MS. DUNCAN: Your Honor, without looking --  
16 having an expert look at the recording devices, I  
17 just don't know. I don't know the method by which  
18 the Government downloaded recordings off the  
19 recorder. So I don't know if they've captured  
20 everything. We have evidence that at least one  
21 recording device may have malfunctioned. But we  
22 can't know for sure unless we have someone whose  
23 specialty in that area, can look at it and say, yes,  
24 in fact, there are no recordings here. It could be  
25 that there are recordings out there that more fully



1 reflect the conversations between Mr. Baca and this  
2 informant. And we should have them so that we can  
3 give a jury that full and fair representation of  
4 those conversations, rather than a partial.

5 THE COURT: I think you're going to give  
6 them a pretty good picture. I think I better leave  
7 the recording devices with the Government. And I  
8 think, with Mr. Carrillo and your arguments, you're  
9 going to give a pretty good picture of what's going.

10 All right. Ms. Fox-Young?

11 MS. FOX-YOUNG: Your Honor, we next asked  
12 for the identity of this informant's law enforcement  
13 handler or other agents who dealt directly with him.  
14 And as noted in our motion, several defendants have  
15 identified the individual as Billy Cordova, based  
16 upon his voice on the recordings. We asked the  
17 Government for the identity of the handler, and  
18 anyone else who dealt directly. And the Government  
19 responded that Mr. Acee dealt with him.

20 But what the Government will not tell us is  
21 who dealt with Mr. Cordova directly at the time of  
22 the recordings. This is, for all the reasons that  
23 I've already mentioned with regard to Mr. Perez'  
24 statements, and whether or not they're voluntary,  
25 this is pretty critical to us. And that is because

1 it's clear that Mr. Cordova was working with law  
2 enforcement. It's clear that he was provided, as the  
3 Government has just informed the Court, with a  
4 recorder, which he could turn on and off. It's clear  
5 that -- to us -- that he was placed, we think, next  
6 to Mr. Perez, at a time when Mr. Perez was in  
7 solitary confinement, and in very poor physical  
8 health, and had been in solitary confinement for a  
9 number of months.

10 So, Your Honor, we're entitled to know who  
11 was coaching, training, prepping, and directing Mr.  
12 Cordova at the time of these recordings.

13 We also request that any law enforcement  
14 notes made prior to, during the course of, or after  
15 the recordings, which are related to these  
16 recordings --

17 THE COURT: Let me ask you this: Let's say  
18 the answer is Bryan Acee. What do you do with that?

19 MS. FOX-YOUNG: Well, we prepare for  
20 suppression, knowing that Mr. Acee was directing Mr.  
21 Cordova to do these things. There may be somebody  
22 else entirely who orchestrated --

23 THE COURT: But I guess I'm trying to think  
24 of why does it matter if it's Mr. Acee, or if it's  
25 somebody that flew out of Washington to coach

1 Cordova. What does it matter to the suppression  
2 motion?

3 MS. FOX-YOUNG: Because we want to talk to  
4 that person, and we want the Court to hear from that  
5 person as to exactly what the Government's  
6 involvement was.

7 THE COURT: But I bet they're just going to  
8 tell you no. They're not going to talk to you,  
9 right?

10 MS. FOX-YOUNG: I don't know. We're very  
11 persuasive, Your Honor. I don't know. But we're  
12 entitled to investigate it. And we're entitled to  
13 subpoena witnesses. We're entitled to work up our  
14 case, not just with regard to suppression, but at  
15 trial, in terms of the voluntariness. It may not be  
16 Mr. Acee at all who was coaching Mr. Cordova in the  
17 hours prior to these recordings, and during these  
18 recordings. Maybe somebody else entirely. Maybe  
19 somebody who works for the Department of Corrections.  
20 And we don't know. But we're entitled to know.

21 THE COURT: What does it get you? I mean,  
22 if you know an informant is being coached, what does  
23 it give you to find out about the coach?

24 MS. FOX-YOUNG: Well, under Fulminante, we  
25 can -- a defendant can get statements suppressed,

1 conceivably, if they were made by a cooperator -- and  
2 I'm paraphrasing -- working in concert with the  
3 Government, if they were coerced statements. We need  
4 to understand the Government's involvement, and I --

5 THE COURT: He could be standing there in a  
6 prison cell with a wire or a recording device, we  
7 probably did make that assumption, right?

8 MS. FOX-YOUNG: Well, Your Honor, yes, we  
9 can. Somebody gave Mr. Cordova questions to ask.  
10 Somebody prepped Mr. Cordova as to exactly what  
11 Mr. Perez had been through.

12 THE COURT: That's what I'm getting at: We  
13 know all that.

14 MS. FOX-YOUNG: Well, we don't know  
15 because --

16 THE COURT: Why do we care about the  
17 identity of that person?

18 MS. FOX-YOUNG: So that we can further  
19 investigate what coaching was done, what prepping was  
20 done, so we can subpoena that person.

21 THE COURT: What if I assume in your  
22 suppression motion that every question that was asked  
23 was coached?

24 MS. FOX-YOUNG: Well, that goes to  
25 coercion.

1 THE COURT: Doesn't that get pretty close  
2 to anything you would need?

3 MS. FOX-YOUNG: Well, I think the Court  
4 would have further questions under Fulminante as to  
5 what that coaching consisted of, and, you know,  
6 precisely what the Government's involvement was in  
7 coercing statements. If there were threats made,  
8 whether those threats came from the Government; you  
9 know, through an informant. So --

10 THE COURT: You've listened to these. Are  
11 there threats made? During the conversations is the  
12 cooperator threatening Mr. Perez?

13 MS. FOX-YOUNG: Your Honor, we'll argue  
14 that the conditions -- altogether yes, because of the  
15 number of factors, these statements were coerced. As  
16 Mr. Beck has told the Court, it is hard to hear and  
17 decipher everything on these recordings. And that's  
18 a process that we're still going through. We think  
19 that there are portions of conversations that weren't  
20 recorded. And that's also evidence that we hope to  
21 have come in. But to this point -- to this request,  
22 exactly what the Government did in handling Mr.  
23 Cordova, basically using him as a government agent to  
24 extract statements, goes directly to the question of  
25 the voluntariness of those statements.

1           And so, what would we do if we knew who it  
2           was? We would do background on that person. We  
3           would find out what other involvement they had. We  
4           would investigate and subpoena other witnesses. We  
5           would figure out if this is a pattern that's happened  
6           in this case, where the Government is coaching and  
7           prepping folks, using -- I mean, there are a number  
8           of things that we would do.

9           THE COURT: Well, you're probably going to  
10          have Mr. Cordova to question at some point, right?

11          MS. FOX-YOUNG: Yes. And the decision of  
12          whether or not he is going to testify, you know,  
13          under Graham, hinges, to some extent, on this kind of  
14          information. And that's -- you know, he is entitled  
15          to this material information to make an educated  
16          decision about whether or not he wants to take the  
17          stand. And, you know, we've got to work up that  
18          portion of the case.

19          THE COURT: You're talking about Mr. Perez  
20          or are you talking about Mr. Cordova?

21          MS. FOX-YOUNG: Mr. Perez. Yeah, Mr.  
22          Cordova has other considerations.

23          THE COURT: You're going to probably have  
24          Mr. Cordova; you can just ask him, right?

25          MS. FOX-YOUNG: Who his handler was? And

1 at that the point, we won't be able to subpoena that  
2 person. If it's not Mr. Acee, we won't be able to go  
3 through the Touhy regs process. I mean, that all  
4 needs to be done upfront, not during the course of a  
5 suppression hearing. And it needs to be investigated  
6 so that we can properly brief the issue for the  
7 Court.

8 THE COURT: All right. Anything else on  
9 that issue, Ms. Fox-Young?

10 MS. FOX-YOUNG: We also request -- and this  
11 is parallel to --

12 THE COURT: I was going to let the  
13 Government respond. Do you have anything else on  
14 that request about the identity of the handler?

15 MS. FOX-YOUNG: No, Your Honor.

16 THE COURT: Okay. Mr. Beck?

17 MR. BECK: Your Honor, a couple of things.  
18 First of all, I just want to remind everyone, I know  
19 that we're talking about Mr. Cordova in this sealed  
20 document that effectively is now unsealed. But he  
21 was the subject of a protective order until we  
22 disclosed it at the last set of hearings. So we'll  
23 remind everyone that if there is a confidential  
24 source, that you might refer to them as a  
25 confidential source.

1           Getting to the substance of this request,  
2           as I think Ms. Fox-Young indicated at sort of the  
3           beginning of her argument, is that the United States  
4           told her that the handler was Bryan Acee. So,  
5           effectively, that part is gone. I think that's more  
6           than she is entitled to -- excuse me, than Mr. Perez  
7           is entitled to under Rule 16, or any other authority.  
8           So this, I think, like the location, is just a  
9           fishing expedition, and asking the Government to  
10          produce things that it doesn't have. And I don't see  
11          that under Rule 16.

12           THE COURT: Nobody else was a handler? It  
13          was just Mr. Acee?

14           MR. BECK: Well, I'm not sure. I mean, I'm  
15          not sure that's true. Mr. Acee was a handler, I  
16          guess, as that term goes. But I guess, if we're  
17          talking about big H or little h. I mean, other  
18          agents interacted with Mr. Cordova.

19           THE COURT: All right. Anything else, Ms.  
20          Fox-Young?

21           MS. FOX-YOUNG: Very briefly, Your Honor.

22           You know, if the Government is intimating  
23          that we're somehow in violation of the protective  
24          order, I just want to remind the Court that several  
25          defendants identified Mr. Cordova on these



1 recordings. And we proffered that in our briefing.

2 Separately, and the Court will hear our  
3 motion to unseal this pleading -- and I won't argue  
4 that now -- but we've absolutely abided by the letter  
5 of any orders entered by this Court.

6 And no, Your Honor, I don't have any  
7 further argument on that substantive point.

8 THE COURT: Well, I think I'm going to not  
9 grant that request. It seems to me that it just  
10 doesn't give any information that's going to be  
11 useful or helpful. I think the point that can be  
12 made can be made with the evidence that already has  
13 been produced, or that will be produced. So I'm not  
14 going to require the Government to disclose further  
15 handlers.

16 All right. Ms. Fox-Young, what do you  
17 think about calling it a day?

18 MS. FOX-YOUNG: Well, Your Honor, I think  
19 in 90 seconds we might be able to wrap up just the  
20 very last part of this subsection. But if the Court  
21 wants to call it a day, we can do it tomorrow.

22 THE COURT: Well, we're going to have to be  
23 here tomorrow.

24 So why don't we go ahead and call it a day.  
25 I'll see y'all at 8:30 in the morning. I appreciate

1 everybody's hard work. Be safe in your travels. See  
2 y'all tomorrow.

3 (The Court stood in recess.)  
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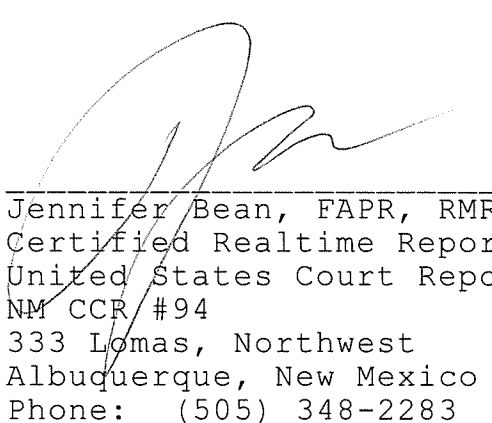
## C-E-R-T-I-F-I-C-A-T-E

UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

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Official Court Reporter for the State of New Mexico,  
do hereby certify that the foregoing pages constitute  
a true transcript of proceedings had before the said  
Court, held in the District of New Mexico, in the  
matter therein stated.

In testimony whereof, I have hereunto set my  
hand on May 18, 2017.



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